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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 840

MILTON HECHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT:	
Point I—The defendant was deprived of his right, under the Sixth Amendment, to be confronted with the witnesses against him, when the Government witness Metzheiser was permitted to testify that his subordinates had not found debits or credits on micro-films of monthly statements in the bank	20
Point II—The testimony of the witness Metzheiser violated the Best Evidence Rule	27
Point III—Defendant was deprived of his right to a trial by an impartial jury as provided by the Sixth Amendment	32
CONCLUSION	42
APPENDIX:	
A—Opinion of United States Court of Appeals for the Third Circuit	1a
B—Judgment of Affirmance of Conviction	5a
C—Excerpts from Testimony of Government's Witness Metzheiser	7a

PAGE

D—Affidavit of Milton Hecht..... 69a

E—Hearing on Investigation of Juror No. 7.... 71a

Order Denying Further Leave to Investigate Juror No. 7..... 90a

Cases Cited

Bruton v. United States, 391 U. S. 123 (1968)..... 22

Flame Coal Co. v. United Mine Workers of America, 303 F. 2d 39 (6th Cir. 1962)..... 30

Gordon v. U. S., 344 U. S. 414 (1952).....26, 28

Greene v. McElroy, 360 U. S. 474 (1959)..... 27

Homes v. United States, 284 F. 2d 716, 97 A. L. R. 2d 782 (1960)..... 39

Mattox v. United States, 146 U. S. 140 (1892)..... 42

Oliver, In re, 353 U. S. 257 (1948)..... 27

Pehar v. United States, 315 F. 2d 319 (C. C. A. 5th Cir. 1963)..... 41

Pointer v. State of Texas, 380 U. S. 400..... 22

Ryan v. United States, 191 F. 2d 779 (U. S. Ct. App. D. C. Cir. 1951).....38, 39

Toho Bussan Kaisha, Ltd. v. American President Line, Ltd., 265 F. 2d 418 (2nd Cir. 1959)..... 30

Turner v. State of Louisiana, 379 U. S. 466..... 23

U. S. v. Alexander, 326 F. 2d 736 (C. A. 4th Cir. 1964) 28, 29

U. S. v. Bufalino, 285 F. 2d 408 (2 Cir.)..... 25

United States v. Guthrie, 387 F. 2d 569.....39, 40

PAGE

United States v. Harry Barfield Co., 359 F. 2d 120 (C. C. A. 5th Cir. 1966) 40

United States v. Reyburn, 31 U. S. (6 Pet.) 352 (1832) 30

Wheaton v. United States, 133 F. 2d 522 (C. C. A. 8th Cir. 1943) 41

United States Constitution Cited

Sixth Amendment 3, 4, 15, 16, 20, 26, 27, 32, 42

Fourteenth Amendment 27

Statutes Cited

18 U.S.C.:

Sec. 371 ..... 2, 5

Sec. 656 ..... 3, 5

28 U.S.C.:

Sec. 1254 (1) 2

Rules Cited

Best Evidence Rule.....4, 9, 15, 27, 28, 30

Federal Rules 27

33 39

F. R. Crim. P.:

52(b) 40

General Rules of the United States District Court:

19(g) 3, 19, 32, 37, 39

The Hearsay Rule 9

PAGE

Other Authorities Cited

1 Jones, Evidence (5th Ed. 1958):

Sec. 231 30

Morgan, Basic Problems of Evidence (1962):

385 30

Richardson, Evidence (9th Ed. 1964):

Sec. 546 30

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Petitioner, Milton Hecht, prays that a writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for The Third Circuit, entered in this case on November 19, 1968.

Opinion Below

The written *Per Curiam* opinion of the United States Court of Appeals for the Third Circuit is printed in Appendix A (A1a). The opinion is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of the United States Court of Appeals and the United States Supreme Court, and has so far departed from accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

The judgment of the United States Court of Appeals for the Third Circuit is printed in Appendix B (A5a). Petitioner has moved for a Stay of the Mandate pending this application for a writ of *Certiorari.*

Constitutional Provisions Involved

UNITED STATES CONSTITUTION—Sixth Amendment

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

Defendant was prosecuted under 18 U.S.C. Sec. 371, which provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof

in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

The indictment charged that defendant and one Paxton, conspired to defraud Citizens National Bank contrary to 18 U.S.C. Sec. 656, as set forth in the *Per Curiam* opinion (A2a).

"Whoever, * * * embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000. or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000. or imprisoned not more than one year, or both."

Questions Presented

1. Was the right of the accused to be confronted with the witnesses against him, provided by the Sixth Amendment, violated when the Bank Auditor was permitted to testify to the absence of debits and credits in relevant Monthly Bank Statements in microfilm form, when he had never seen such microfilms and

all his information was received orally from unidentified members of his investigating staff?

2. Was the accused deprived of his right to be confronted with witnesses against him, when the Bank Auditor, over objection, was permitted to testify in summary oral fashion concerning the results of a bank investigation physically conducted by others, with no foundation in the evidence of testimony by the particular functionaries who had seen the microfilms (in a machine) or introduction of pictures of the microfilms of the monthly statements into evidence?

3. Was the defendant deprived of his right of cross-examination of anonymous bank employees who had evaluated the presence or absence of relevant debits and credits in a microfilm machine, without written record of their findings, when such employees were not numerous and such microfilm evaluations were not voluminous in order to convict the defendant?

4. Did the Best Evidence Rule require the production of at least the Secondary evidence of microfilm pictures of the relevant monthly bank statements, so as to afford the defendant an opportunity of cross examination?

5. Was the right of the defendant to trial by an impartial jury, provided by the Sixth Amendment, violated when it developed at the end of the trial, that a spectator for four weeks, turned out to be the husband of a female juror, and who had had conversations with the Bank Auditor, the U. S. Attorney prosecuting the case, and other Government witnesses, during the trial?

6. Was the right to an impartial jury violated, when at a limited hearing before the U. S. District Judge,

it developed that the husband of the female juror had gone out to lunch with other female jurors, during the trial?

Statement of the Case

The judgment of the United States Court of Appeals for the Third Circuit (dated November 19, 1968), here sought to be reviewed, is an affirmance of the conviction of the within petitioner of Conspiring (18 U.S.C. Sec. 371) contrary to 18 U.S.C. Sec. 656, in the United States District Court for the District of New Jersey.

The defendant Hecht was charged and found guilty by a jury of violation of Title 18 U.S.C., Section 371 for an alleged conspiracy with one Francis J. Paxton, to commit an offense against the United States, that is, to, with intent to injury and defraud the Citizens National Bank of Englewood, New Jersey, willfully misapply, abstract and purloin monies, funds and credits of said bank in violation of Section 656 of Title 18 U.S.C. The indictment was found on January 28, 1966, and the conspiracy as alleged by the government, started May 10, 1960 and continued until August 11, 1965, in the form of agreement to allow overdrafts and false credits in favor of Hecht personally and his Corporate Accounts, by Paxton, the Assistant Cashier of the bank.

The trial began on May 3, 1967 and concluded on May 26, 1967 (R1292a, R1333a).

Defendant was sentenced to three (3) years in a federal prison and fined $5,000.00.

The Defendant Milton Hecht, was a depositor in a checking account with the Citizens National Bank of Englewood, in its Branch office in Tenafly, New Jersey, personally, and two corporations of which he was an officer, were also depositors, namely, Colortone Corp., and

Star Brite Corp. During most of the period in which the corporation accounts existed, the defendant Milton Hecht was in charge of the issuance of checks of these corporations, and their Manager.

The Indictment (R5a) sets forth in its first Count the alleged conspiracy between the defendant Hecht and the Assistant Cashier, Paxton, and the alleged overt acts in the service of the conspiracy. It recites all alleged transactions occurred between May 11, 1960 and October 11, 1965 inclusive. The Assistant Cashier, Paxton, pleaded guilty to all three counts (R364a, R365a) of the indictment. Only Count I of the Indictment (Conspiracy) affected the defendant Hecht.

During the course of the trial the Government submitted evidence which, *if competent,* demonstrated a loss to the Citizens National Bank of Englewood, of over $300,000.00 through various manipulations, *apparently* in favor of the personal account of Milton Hecht and the Corporation accounts of Colortone Photo Service Inc., and Star Brite Photo Corporation, which were managed by Hecht.

During the course of the trial the Government introduced hundreds of Business Records of the Bank into evidence, after identification by bank officials. The first Witness, Redfield, (R26a) was the bank comptroller and on the basis of his testimony the Government introduced into evidence checks found in a cabinet or desk of the Assistant Cashier, Paxton, namely Exhibits G-1 through G-53 and G-55 through G-114. These were checks that the Government charged had not been debited in the accounts of defendant and therefore the bank sustained a loss. But at no time during the trial did the Government introduce into evidence microfilm pictures of the monthly statements which corresponded to these checks, to prove that no debits had been entered in the accounts.

No explanation or foundation for nonproduction was offered by any witness.

The Government's main witnesses consisted of a former bank official (Paxton) who had pleaded guilty to all counts of the indictment, and a contemporary bank official (Metzheiser), the bank auditor, who had shared years of employment with him in the bank.

Paxton testified that he had been Head Bookkeeper and the assistant cashier of the Citizen's National Bank (R235a). He testified that the checks represented in Government's Exhibits G-1 through G-53 and G-54 through G-114, were "held-back checks" which were never posted (debited to defendant's accounts) and he testified that defendant was "credited" with deposits which were never made, by Paxton's various manipulations. He testified he had agreed with the defendant to hold back the checks (not post them or debit the accounts) knowing that the bank would be ultimately charged.

He first testified to support his identification of Government's Exhibits G-1 through G-53 and G-55 through G-114, as ("held-back checks") which had not been charged to the Hecht accounts, that he knew this because they were the checks he had kept in his metal file (R337a; R328a; R342a; R347a) as he only kept such chcecks in his file, and these checks were kept in the metal file to "hold over" the defendant Hecht (R251a). But Paxton finally conceded that *Paid* checks were also in his personal file (R320a; R441a; R454a; R347a) or desk drawer (R348a) together with anpaid checks.

Before any dealings with Hecht, the witness Paxton had been manipulating other accounts such as the Morcales account for $10,000.00 (R177a; R228); without compensation, and concurrently with his dealings with Hecht, Paxton had embezzled funds in the manipulation of his personal account (R242a) but could not remember the

amount thereof and exactly how he covered it up (R233a) except partly, and he testified he had held back $6,000.00 worth of checks in St. Therese's Church accounts (R213a).

The witness Paxton testified that he agreed with Hecht some six to eight months after May, 1960 to be paid Fifty ($50.00 Dollars a month for holding back checks upon request of Hecht (R243a) but only after Paxton had already held back some $20,000.00 worth of checks for six to eight months (R243a) for which the Bank was presumably ultimately charged. He testified that he held back paid checks and bank statements of defendant's accounts (R391a) and didn't know if defendant was aware of this. Paxton stated that he was uncertain about facts as he did not have the bank records (R386a; R204a; R196a; R200a; R202a; R203a; R234a).

Paxton testified that Hecht would at times, tell Paxton to return checks, not covered by sufficient deposits, to the payee (R415a). He conceded that Hecht accounts could have involved thousands of checks (R431a). He conceded it was possible he forgot to reprocess checks after deposits were made (R360a). He conceded that he had the power to have "created" deposit slips arbitrarily (R259a) for numerous depositors, such as G-115 (R254a), and unless he had named the parties for whom it had been done all 30,000 accounts of the bank would have had to be investigated (R260a).

Paxton testified that thousands of checks passed through the personal account of Milton Hecht and his corporation Colortone and Starbrite, between May 1960 and September 1965. The defendant Hecht always promised to make deposits and to cover the checks (R174a). His testimony shows that hundreds of deposits were made after a particular check was held out (R337a; R360a) and that there was no agreement that subsequent deposits *were*

not to make up held-up checks. His testimony showed that Hecht was constantly making deposits and that Paxton also had possession of "paid checks" charged against Hecht's account.

Paxton conceded that he could hold checks back, awaiting a deposit, and then forget to reprocess the checks after the deposits had been made (R360a) and that he had held backs checks which were actually paid in the future, with deposits (R337a).

Mr. Paxton was also an employee of the U. S. Post Office during his tenure as assistant cashier of the bank, and had access to mail of Colortone and Starbrite corporations (R238a).

The Government then offered as a witness, the Bank Auditor, Metzheiser.

The defendant had objected to the testimony of the Government's witness Metzheiser as incompetent, from its inception (A9a) as violative of The Best Evidence Rule, and The Hearsay Rule, and moved to strike his testimony as consisting of conclusions by a witness who was not personally qualified or as an expert. The Government answered that he was not being offered as an "expert" (A9a). The witness continued to testify and again the defendant moved to strike his testimony as being conclusions (A11a), and hearsay, for which no proper foundation had been laid. The witness had testified that the investigation of bank records had been done under his "supervision and direction" and so his testimony was obviously hearsay learned from others (A10a). The Court pressed the witness to determine whether his conclusions would be hearsay and again he said the records involving the particular accounts were investigated by other people, "under his supervision and direction" and that he did only a "small amount" of the work personally (A12a).

Only if a subordinate (on the investigating staff) found a "debit" similar to the check debit that was being searched for, in a microfilm machine (which permitted the subordniate operator to examine the relevant monthly statements), would (in the discretion of the subordinate operator of the machine) a microfilm picture be made of the particlular debit and then shown to the witness Metzheiser (A13a). If the subordinate told the witness Metzheiser that no debit had been found on the monthly statement then the witness Metzheiser would take his word and testify to its non-existence conclusively, even though he did not know it to be true of his own knowledge (A13a).

Each microfilm of a monthly statement in the machine had also to be evaluated as to whether or not it was an authentic record or a fabrication by Paxton. Employees looking at the microfilms, were instructed that the mere absence of a relevant debit, did not conclude the evaluation of the microfilm of the monthly statement (A43a) because each had to be tested by complex standards (A20a) of authenticity and manipulation, the application of which were judged by the anonymous subordinates.

No microfilm pictures were made of the monthly statements corresponding to the monthly dates of the checks or the successive month, though this would have been an easy task, to prove the Negative fact that no "debit" had been entered in the bank records of monthly statements. The Government entered voluminous written records into evidence except in respect to the most crucial aspect of the case.

The U. S. Attorney continued to argue (in front of the jury) that all of the records of the bank would have to be brought into Court to prove a "negative" (A11a) when the only issue was one of microfilm pictures of the

monthly statements—which the U. S. Attorney stated he could show (A11a), but they would only show a "negative". Defendant objected to this prejudicial argument and it was stricken (A11a). The argument of the Government as to why the competent records of the monthly statements were not brought into evidence as a foundation for Metzheiser's testimony or for use on cross-examination, was "supported by no higher authority than its own rhetoric."

The witness Metzheiser was permitted to testify that no debits had been entered in the relevant monthly statements when he had *not* personally seen them, or microfilm pictures of them, in support of his *expert* conclusion that therefore the accounts had not been charged but the bank had been (A12a; A13a). The Court did not strike the testimony on Motion by defendant nor honor his objection. The witness was permitted to continue his testimony constantly using the word "we" (A13a to A18a) in relation to all other Government Exhibits, and constantly stating the conclusion that the various exhibits had not been charged (debited) to the personal account of defendant, or the Colortone and Starbrite corporation accounts controlled by defendant (A10a; A11a). The investigation was directed toward Paxton's admissions (A18a). Again he stated that the work was merely done under his supervision and direction (A10a). Again the defendant moved to strike the testimony of the witness Metzheiser on the ground that he was merely stating conclusions and that the best evidence to support such conclusions would be the bank records themselves (A11a). The Court permitted the witness Metzheiser to continue his testimony and did not grant the Motion to Strike. This action of the Court was presumably based on the representation of the United States Attorney (A11a) that he would have to bring all the records of the bank in to Court merely

to prove a "negative", namely that a given monthly statement (in microfilm) pertaining to a particular dated check of the Government's exhibit would merely demonstrate the absence of a debit pertaining to that check in the corresponding monthly statement (A11a). The defendant persisted in his objections to the testimony (A12a) but the Court did not sustain him.

The United States Attorney in his representation to the Court implied that there were corresponding monthly statements (in microfilm form) on which no debits were shown for each and every one of the checks involved (A11a). But when the witness Metzheiser was cross-examined it became more clear that he was basing his conclusions on what other employees were doing (A20a; A21a) *and not* on whether or not microfilms of relevant monthly bank statements showed a debit for any particular check (A19a; A20a). The witness Metzheiser had been confronted with 120 Paid Checks found (marked PAID) in Paxton's metal cabinet (A18a; A19a) which he testified had been charged against the particular Hecht accounts. These 120 checks were marked D-10 for Identification (A18a; A19a), and later put in evidence by the defendant. The decision by Metzheiser as to whether or not he concluded they had actually been charged against the Hecht accounts depended upon whether one of his employees found a microfilm of a monthly statement showing no debit, including false (recreated statements) monthly statements for each month and *his belief* that the recreated statements by Paxton were attached to monthly statements that were false (A19a; A20a).

The witness, Metzheiser, testified that he found a "great number of checks" (in Paxton's metal cabinet) marked "Paid" drawn by Starbrite and signed by Milton Hecht, the defendant. Metzheiser also found Colortone Photo Service checks marked "Paid" (A19a) in the metal cabinet

of Paxton. Metzhesiers' "investigation" showed that checks marked "Paid" were charged against the Hecht accounts and that many checks *not marked "paid"* were actually charged against the Hechts5 accounts and that it was not of too much concern whether or not checks were actually marked "paid" because in the final analysis that had to be determined by reference to bank statements (A13a).

The witness, Paxton, had made out false monthly statements, which were put in microfilm form. The authenticity of the monthly statement looked at in the microfilm machine by unidentified employees was arbitrarily checked by two other "disinterested" employees who decided if "credit entries" could be located, then it was a legitimate monlyth statement (A20a). The defendant was confronted with such an undefined speculative basis, instead of the production of the microfilm pictures.

Metzheiser could not follow Paxton's manipulations before June 1964 (A21a to A22a) and reconciliations could not be made because before that date there had only been mechanical equipment in the bank and after that date a computer was installed. Paxton had had the power to manipulate freely before the computer was installed, and the investigators could not find out how things were done. The computer could also have been manipulated as secretively easily by Paxton. General ledger accounts could only be accurate if entries were accurate (A22a).

On cross-examination, Metzheiser was confronted with Government Exhibits that he had testified to previously as not charged against the Hecht accounts because the monthly statements (microfilms) had shown no corresponding debits thereon (A38a). He was confronted with G-32 in evidence (A38a) and conceded that his staff had never found a microfilm of the monthly statement for G-32

(A40a). He then stated that there were other reasons for reaching the conclusion that a particular check had not been charged against the account than merely because there was no debit on a discovered monthly microfilm statement (A40a). There could have been a microfilm record of a check, he said (A41a), but he did not testify one had been found nor were they produced in court. He also admitted no monthly statement for G-31 could be found (A41a; A42a), or for G-34, G-111, G-112 and G-113 (A41a; A42a). These admissions made all similar testimony by Metzheiser that his staff had seen the monthly statements (microfilms) in respect to G-1 through G-53 and G-55 through G-114, suspect, and his conclusion that these checks had not been charged to Hecht accounts, based on such alleged monthly statements, in microfilm, doubly incompetent.

The witness Metzheiser testified that the staff under him investigated monthly statements (microfilm) for a period of a month from the date of the particular check (A12a; A13a). Then he testified that sometimes a charge for a particular check had been entered on a bank statement three (3) or four (4) months after the date of the check (A44a). But usually, he testified, the investigation of a particular check covered only a three to four week period from its date (A44a) because the "odds were against" a later charge (A44a) on the acounts.

The Government again called Metzheiser as a witness, in Rebuttal (A45a), and again on cross-examination he testified that it was "our" investigation (A47a), that he had done a "little bit more" work on the investigation than others (A48a), and again testified to his opinions based on hearsay from other employees and from Peat, Marwick, Mitchell & Company's employees (sic) (A54a). Metzheiser made no written report (A55a) of his investigation and relied on partial memoranda (A156a). He was eva-

sive concerning the manipulations of Phoenix Industries accounts (A58a) involving a balance of $295,000.00 and when questioned about it could not remember it because (A59a): ". . . we had lots of *people going around looking for statements and stuff*. If they brought me these, sometimes they meant something, sometimes they didn't." He had no memroy of various accounts found in Paxton's metal file (A61a). Others had worked on these accounts, and he had no notes (A52a). Relevant bank records were missing (A23a).

Defendant continued to object to the witness' conclusions (A49a; A50a; A53a) during Rebuttal. Metzheiser testified that he had made a thorough investigation of Coffin Turbo accounts but constantly used the word "We" in reference to various accounts (A47a; A48a) and then he could not remember the magnitude of his role in each investigation and that many employees were helping him. His rebuttal reinforced the fact that Metzheiser's testimony was substantially based on hearsay and speculation (A50a; A51a) and was not the Best Evidence and therefore the defendant moved to strike it (A63a) when Metzheiser concluded his Rebuttal testimony.

The Defendant moved to strike the testimony of the witness Metzheiser (A63a) on the ground that his testimony was based substantially on hearsay and would be violative of defendant's constitutional rights under the Sixth Amendment (A63a) and that it violated the Best Evidence Rule in that the Government did not produce the documents on which the opinions of the witness were based and it attempted to prove their terms and existence through secondary evidence, namely, Metzheiser's oral hearsay testimony (A64a) and especially as to his testimony concerning the 113 checks (A65a; A66a; G-1 through G-53; G-55 through G-114). The defendant also moved the evidence be stricken because the court had permitted it only on the representation of the Government (A11a) that

it need not prove bank documents because he was proving only (A66a) a "Negative" through the witness Metzheiser in respect to the absence of debits on monthly statements, whereas cross-examination had demonstrated the records were missing or destroyed, or monthly statements had to be evaluated to prove that the absence of a debit was conclusive as a "negative" (A20a; A43a).

The defendant could not learn the terms or the extent of such missing or debatable records in respect to the 113 checks unless relevant available monthly statements (microfilm picture) were brought into court by the Government (A66a). The Court denied the Motion (A68a).

Excerpts from the testimony of the Government's witness, Metzheiser, including objections and motions to strike his testimony as based on hearsay, and in violation of the defendant's right to be confronted by witnesses against him under the Sixth Amendment, are printed in Appendix C (A7a to A68a).

The defendant testified in his own behalf (R945a) and denied that he had any knowledge of Paxton's manipulations (R1028a; R1017a; R1018a; R1019a) and he denied any conversations, conspiracy or agreement with Paxton, to hold back checks (R1019a). He denied agreeing to pay Paxton money and testified that he never paid him money (R1030a). He never missed his bank statement or his checks (R1022a; R1013a) or worried about overdrawing his accounts (R1021a) because he believed overdrawn checks went back to the creditors as he knew from his own experience (R961a). He often issued checks knowing there were no funds in the bank (R652a) expecting Accounts Receivable to cover them with deposits in time. He ran the business deliberately relying on the bank, his accountant Levine (R1015a), and on a part-time Bookkeeper. He was primarily interested in building up the volume of business (R993a) as only then would there be

a net profit (R994a). His gross annual deposits amounted to about $500,000 a year (R984a) and he drew thousands of checks. As Manager his policy was one of keeping the "overhead" low, in terms of hiring office personnel. He testified that in March 1964 there had been a Breaking and Entry in his business office (R997a) and many records were stolen (R998a), including bank statements and cancelled checks (R1000a). This was reported to the Englewood Police. He testified that in July 1965 a flood occurred in the business premises and this flood caused the destruction of more records or their disposal as waste (including banking records) and this flood was reported to the Fire Department (R1000a; R1001a), which responded.

Defendant's accountant Levine had had a heart attack before trial (R1002a).

Officer Baldwin of the Englewood Police testified as to the Breaking and Entry, and corroborated defendant (R722a).

Captain Schwarz of the Englewood Fire Department, testified and corroborated defendant as to the flood (R935a).

Marvin Hecht, brother of defendant and employee of the business testified in corroboration of how the business was operated (R663a). He testified that he often gave deposits to Mr. Paxton to make for the firm (R687a; R688a).

The witness Rossen, an employee of defendant's business in a retail outlet, testified that Mr. Paxton was a customer of the retail outlet (R654a) and that when he learned of the flood at the main office, he advised Paxton (R656a) of it as Paxton's film was not ready. Rossen went over to the flooded premises and corroborated the destruction of office records (R662a).

A year before the trial, the United States Government had subpoenaed all records and monthly statements of the private account of the defendant, and of the accounts of

Colortone and Starbrite corporations, which the defendant managed (R975a), and whatever the defendant could find had been delivered to the United States Attorney in a suit case (G-169 for Id.; R976a). The U. S. Attorney always had possession of them and still has. There was no index of the thousands of items, and no orderly classification of the records. Records that had been stolen (R998a; R1000a) were not included, nor were lost records or records damaged in the flood of July 1965 (R1000a; R1001a). The U. S. Attorney gave no detailed receipt for such of the records he received, and he in turn did not classify them or sort them out in an orderly fashion. During the trial there was no efficient way to get to a particular record of a monthly statement, even if one existed. Practically speaking, there was no documentary data available to the defendant during cross-examination, unless immediately shown by the prosecution.

The Government also had in its possession all the original records found in Paxton's cabinet in the bank (R27a; R39a) including original monthly bank statements and checks (R509a A19a), and "recreated statements" (A20a). Paxton had testified that he had held back bank statements (R391a). The United States Attorney had argued in his summation that the defendant had had knowledge of an impending investigation in July 1965 and therefore deliberately had had his records flooded (R1291a; R1292a). He therefore conceded lost records.

Neither the defendant nor the United States Government had access to all the original records, and such as were available were voluminous and in confusion. Only the bank could supply the limited relevant microfilm, the relevancy of which was determined by the Prosecution as it proceeded.

The Jury returned a verdict of guilty.

Before sentence, defendant moved the trial court for leave, pursuant to Rule 19(g) of the General Rules of the United States District Court, to investigate fully the possible misconduct of a juror (R1334a; R1342a) and for a new trial on that basis, supported by affidavits of defendant (A69a) and his brother Marvin Hecht (R1343a) to the effect that it had been ascertained that a spectator during the four week's trial who had conversations throughout the trial with Government witnesses, might have been the husband of female Juror No. 7. The motion for a new trial was denied (R1347a) but it incorporated an Order to hold a hearing under Rule 19(g) to determine whether there was just cause under the Rule to investigate the juror. The affidavit of Milton Hecht is printed in Appendix D (A69a) and the text of the limited hearing is printed in Appendix E, (A71a). Defendant moved for a full hearing at the limited hearing but this application was denied (A90a).

The limited hearing disclosed that the husband of Juror No. 7 had denied having had conversations with Government witnesses and denied a conversation with the U. S. Attorney, though the U. S. Attorney conceded a conversation with him (A84a; A85a). The hearing did establish that the husband of Juror No. 7 had gone out to lunch with other female jurors during the trial (A75a; A76a). The defendant was given no opportunity to present witnesses to the many conversations alleged in his affidavit or to have discovery concerning the nature of those conversations.

REASONS FOR GRANTING THE WRIT

POINT I

The defendant was deprived of his right, under the Sixth Amendment, to be confronted with the witnesses against him, when the Government witness Metzheiser was permitted to testify that his subordinates had not found debits or credits on micro-films of monthly statements in the bank.

The Government has only introduced hearsay evidence to the effect that subordinates of the witness Metzheiser did the routine work of looking at microfilm records of monthly statements of the relevant accounts to determine whether or not they showed debits and credits. The subordinates did such work, and in no event did the witness Metzheiser study with his own eyes the microfilm records of the monthly statements of the accounts. He is therefore not competent to testify that such records failed to show the debits and credits in issue or to evaluate what they showed.

There was no written record kept of the investigation of the bank's records, nor was there a schedule drawn up in advance of trial to alert the defendant as to which checks in evidence would fail to show up as debits in monthly statements. Such information would not have been furnished him upon demand, before trial, and were not shown at the trial, and in any event the defendant had the right to expect proof by the government of pictures of the monthly statements (bank records) showing the negative of "no debit", or *testimony by the subordinate employees who actually looked into the micro-film machines at the monthly statement*.

The investigation was structured as follows (A12a; A13a):

a.) Metzheiser, the bank auditor, had an unidentified staff of bank employees whom he supervised.

b.) He detailed them to look at microfilm of monthly statements relevant to checks in evidence as G-1 through G-53 and G-55 through G-114, and other exhibits.

c.) The employees looked at the microfilms of the monthly statements in a machine which magnifies them so that the operator can read every *debit* and *credit* for the month corresponding to the check he holds in his hand.

d.) The operator had orders from Metzheiser (the supervisor of the investigation) to make pictures of the *debits* and checks that were similar in amount to the one check being investigated.

e.) If the operator found no debit similar to the amount of the check being investigated, he then reported orally to the supervisor that there was no debit for the particular check in the monthly statement. No picture was taken of a microfilm of a monthly statement that showed "unambiguously" that there had been no debit for the particular sum of the relevant check, or no relevant credit for some other exhibit.

f.) No pictures were taken of the monthly statements for the peroid of time they should have reflected a debit for the particular check it was claimed was being "held back".

g.) The supervisor was only physically present when a picture showed a debit which was ambiguous, but if the monthly statement showed no "ambiguous" debit, Metzheiser was not shown it. He did only "a very small amount of the work personally (A12a).

Paxton had testified that many checks were held back for a considerable period of time and then when deposits were made, the accounts would be debited (R337a; R360a).

Metzheiser testified to the same effect, and had ordered his staff to check over shorter and longer periods (A44a) of time. Defendant had no opportunity to cross examine the employees as to the various successive monthly statements they had checked (assuming any were ever checked), as was necessary in view of the "detailed marks of peculiarity" in Paxton's manipulations of accounts and his fabrications of monthly statements (A20a; A43a).

Defendant's objections were a demand for the production of documents. Defendant would have been satisfied with microfilm pictures of the relevant monthly accounts allegedly evaluated. Metzheiser, who was not an expert, found it necessary to rule out the ambiguities in the form of similar sums in debit form, to questionable checks. His "judgment" did not conclude the ambiguities (A20a; A43a).

The right of cross-examination is one of the safeguards essential to a fair trial.

> "The right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."
>
> *Pointer* v. *State of Texas,* 380 U. S. 400, 404; *Bruton* v. *United States,* 391 U. S. 123, 137 (1968).

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of defendant's right of confrontation, of cross-examination, and of counsel."

Turner v. *State of Louisiana*, 379 U. S., 466, 472-473.

The Court of Appeals finds as a fact that the witness Metzheiser was relying on hearsay evidence from his subordinates (Appendix A: A3a) but excuses it as an exercise of Judicial Discretion because the records would have been "voluminous and because the defendant had access to the records." Factually, the record does not support either that the limited number of microfilm pictures of monthly statements in support of the checks represented by Government's Exhibits G-1 to G5? and G-55 through G114, would have needed "voluminous records". *Actually, defendant's request would have only required thirty-three (33) microfilm pictures* of monthly statements, as many checks were dated for the same month and year (R38a to R47a; R77a). The Government found it no inconvenience to introduce literally hundreds of other exhibits, in original or microfilm picture form.

There was no evidence that "voluminous records" would be necessary to prove the monthly statement pictures requested, by any witness, including Metzheiser. Only the statement by the U. S. Attorney which was stricken (A11a; A12a) as not evidence recited that "voluminous bank records" were necessary.

The record does not support the finding of the Court of Appeals that (A3a) the records in question were available to the defendant." The defendant had no way of knowing what checks would be questioned at the trial, or what the manipulations of Paxton were, and inasmuch as he had issued thousands of checks, he would have required the "voluminous records" of the entire bank over a five year period. The defendant's defense was that whatever went on in the bank was intramural embezzlement on a large scale compromising all the officers

of the bank. The defendant did not have the burden of proof, or the burden of investigating all the ramifications of manipulation in the bank and had a right to rely on the general proposition that the Government had the burden of proof and would prove its case with competent evidence. The proof that the records were not available to the defendant is that upon his demand for the monthly statement microfilm pictures, the Government did not order them produced, nor did the Court, in the middle of a trial.

A year before the trial, the United States Government had subpoenaed all records and monthly statements of the private account of the defendant, and of the accounts of Colortone and Starbrite corporations, which the defendant managed (R975a), and whatever the defendant could find had been delivered to the United States Attorney in a suit case (G-169 for *Id.;* R976a). The U. S. Attorney always had possession of them and still has. There was no index of the thousands of items, and no orderly classification of the records. Records that had been stolen (R998a; R1000a) were not included, nor were lost records or records damaged in the flood of July 1965 (R1000a; R1001a). The U. S. Attorney gave no detailed receipt for such of the records he received, and he in turn did not classify them or sort them out in an orderly fashion. During the trial there was no efficient way to get to a particular record of a monthly statement, even if one existed. Practically speaking, there was no documentary data available to the defendant during cross-examination, unless immediately shown by the prosecution.

The Government also had in its possession all the original records found in Paxton's cabinet in the bank (R27a; R39a) including original monthly bank statements and checks (R509a; A19a), and "recreated state-

ments" (A20a). Paxton had testified that he had held back bank statements (R391a). The United States Attorney had argued in his summation that the defendant had had knowledge of an impending investigatoin in July 1965 and therefore deliberately had had his records flooded (R1291a; R1292a).

Neither the defendant nor the United States Government had access to all the original records, and such as were available were voluminous and unanalyzed. Only the bank could supply the limited relevant microfilms, the relevancy of which was determined by the Prosecution as it proceeded.

The Court of Appeals also states that the records were not necessary because they would only have proved a "negative" (A3a). But as demonstrated in the evidence the proof of the "negative" did not rest conclusively on the absence of a "debit" in the monthly accounts. A complex study of each monthly statement was required to determine from its entire context whether or not the absence of a debit was conclusive as a "negative" (A20a; A43a), as testified to by the witness Metzheiser.

If the records were too "voluminous" for the Government, they could hardly be practically accessible to the defendant unless the phantasy of their nature was appropriately reduced by cross-examination and the rules of evidence.

> "* * * Conviction for a crime which the government could not prove, on inferences no more valid than others equally supported by reason and experience, and on evidence which a jury could not properly assess, cannot be permitted to stand." *U. S.* v. *Bufalino*, 285 F. 2d 408, 418 (2 Cir.).

> ". . . where, as here, the Government's case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, that witness' credibility is subject to close scrutiny."
>
> *Gordon* v. *U. S.*, 344 U. S. 414, 417 (1952).
>
> "Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused persons on the testimony of untrustworthy witnesses'." *Gordon* v. *U. S., supra,* 419.

The Government does not explain its failure to produce *as witnesses, the subordinate employee or employees,* who actually looked at the microfilms, nor does the Court of Appeals explain why the defendant should not have been confronted with the real witnesses against him (the inspecting employees). There were only thirty-three (33) microfilm inspections involved and a single employee could have accomplished their visual inspection and then testified, assuming the defendant was not entitled to pictures of the microfilmed monthly statements. Thus, the defendant would have had an opportunity to cross examine the witnesses (investigatory employees) as to their instructions, criteria of evaluation as to the conclusiveness of any apparent "negative" or whether there was in fact a "negative" in the form of an absence of a particular debit. The "negative" being established by the Government was a carefully constructed phantasy without the necessary preceding testimonial or documentary analysis that would justify it. The Government achieved an illusory prejudicial instant perspective of "guilt" by violating the Sixth Amendment, and due process.

The Sixth Amendment's right to Confrontation and cross-examination is an essential and fundamental requirement which is this country's constitutional good. *Greene* v. *McElroy,* 360 U. S. 474 (1959).

To deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. *In re Oliver,* 353 U. S. 257 (1948).

POINT II

The testimony of the witness Metzheiser violated the Best Evidence Rule.

Defendant objected numerous times to the testimony of the witness Metzheiser as resting on hearsay, as violating the best evidence rule (A9a; A11a; A12a; A12a; A49a; A50a; A53a) and finally moved to strike all his testimony as incompetent and in violation of the defendant's right to be confronted with witnesses against him as provided in the Sixth Amendment (A63a; A64a; A65a).

Monthly Bank Statements or microfilm pictures thereof, of a particular account are single sheet records, easily severable from other bank records. Their proof does not involve voluminous records as would the record of "non-membership" or some other "negative" in voluminous official Government records. That is the reason special Federal Rules and statutes allow a Government official to certify *he* searched the records and found no particular entry. But a partisan bank official of a compromised bank does not have the trustworthiness of a Government official, and where he did not search the records himself he can not reliably certify such a search. The only picture of a microfilm that Metzheiser ever

saw was when an employee, in his discretion decided to show him one of a monthly statement because in the opinion of the minor employee a particular debit or credit shown thereon, was similar to a relevant item being searched for (A13a). If such pictures could be produced, then a picture of a monthly statement showing *no debit* or credit could have been produced for the trial.

> "The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction."
>
> *Gordon* v. *U. S.*, 344 U. S. 414, 421 (1952).

The esoteric manipulations of the Assistant Cashier, Paxton, invested all the bank documents with "detailed marks of peculiarity". *U. S.* v. *Alexander*, 326 F. 2d 736, 742 (C. A. 4th Cir. 1964). The latter was a criminal case involving the non-production of an original check, and the conviction was reversed because of the violation of the best evidence rule.

It is the defendant's contention that microfilm pictures of the relevant monthly statements would have contradicted the testimony of the witness Metzheiser.

The bank auditor, Metzheiser, had every motive to conceal the intramural manipulations and embezzlements in the bank, and their true beneficiaries.

Objective testimony was important to determine for whom the Bank ultimately suffered a loss, and which accounts (behind Paxton's manipulations) ultimately were not charged, and caused such loss to the Bank.

For the purposes of the case *sub judice,* microfilm reproductions, would have been indistinguishable from the originals.

> "As between a written instrument and a copy or parol description thereof, the rule operates to accept the former and exclude the latter. As to its contents, the writing is certain; any oral description thereof necessarily involves the frailties of human recollection and any copy, the hazards of faulty duplication. In addition, there exists the possibility of prejudice or interest influencing either the testimony of a witness or the accuracy of the copy. Given a choice between the two, the law accepts the certain and rejects the uncertain. The defendant is entitled to a new trial." *U. S.* v. *Alexander, supra,* 742.

The Government introduced hundreds of exhibits into evidence and now argues weakly that the proof of a few bank statement microfilm pictures would have required a "voluminous proof". But even where documentary originals need not be proved, secondary proof to establish the "absence of an entry" therein, must be established by *someone who has inspected the documents.* This is true even on a Civil level:

> "We are not impressed that the pretrial offer of plaintiffs' counsel to allow a general inspection of its records was a substitute for having the records available and identified at the trial. Defendant's counsel was entitled to review such records with particular reference to the exhibit offered. The accuracy of the underlying figures and factual assumptions, and the validity of the conclusions of the exhibit could not be tested until the exhibit itself was seen and disclosure made of what was to

be claimed for it. Cross examination of the witness producing the exhibit was frustrated by the absence of material claimed to support it."

Flame Coal Co. v. *United Mine Workers of America,* 303 F. 2d 39, 45 (6th Cir. 1962).

The testimony of Metzheiser as to the terms and existence of microfilm copies of monthly statements and cancelled checks, was *Hearsay Evidence* of their terms and existence, without proper foundation as to why the documents were not being physically produced. The Best Evidence Rule prescribes "the best proof that the nature of the thing will afford." The disclosure by Metzheiser that no microfilm monthly statements were found for G-31, G-32, G-111, G-112 and G-113 (A41a; A42a; A43a) after he had testified that his staff had found them in his direct examination (A13a), completely exposed a fraud concerning all the exhibits, and justified defendant's objection in the first instance to a violation of the Best Evidence Rule that required the records for each check to be brought into Court (A10a; A11a), and prohibited their proof by oral testimony, secondarily.

Prevention of Fraud is cited by authorities as the rationale for the Best Evidence Rule. *United States* v. *Reyburn,* 31 U. S. (6 Pet.) 352 (1832); *Toho Bussan Kaisha, Ltd.* v. *American President Line, Ltd.,* 265 F. 2d 418, 424 (2nd Cir. 1959); 1 Jones, Evidence, Sec. 231 (5th Ed. 1958); Morgan, Basic Problems of Evidence 385 (1962); Richardson, Evidence Sec. 546 (9th Ed. 1964).

The cross examination of the witness Metzheiser who was producing "oral material", was frustrated by the absence of written material (blank records) claimed to support it. This was true in relation to all of Metzheiser's testimony concerning debits and credits and not

merely in relation to his testimony concerning G-1 to G-114. Hundreds of similar Government Exhibits were supported merely by Metzheiser's hearsay testimony instead of by direct testimony of a witness or the production of relevant bank records.

The reported cases hold there must be a written summary or schedule of facts of allegedly complex material, *even when the witness has made personal inspection* of voluminous documents, and a proper foundation must be laid that such summary is an accurate summary. The foundation must be laid that the originals supporting such summaries or copies thereof supporting the conclusions or summaries, must be available to the opposing party as a practical matter not theoretically and legalistically.

The defendant could not effectively cross-examine the witness Metzheiser because of the absence of the written records allegedly existing in support of his testimony, and he could not effectively cross-examine the employees of Metzheiser, who had furnished him information on the basis of bank records, because they were not physical witnesses, present in court. Defendant found himself in the position of being offered cross examination of the ghost of hearsay from employees, based on the ghost of bank records that were not produced. It is not permitted to the Government to oversimplify its prosecution with such incantations.

POINT III

Defendant was deprived of his right to a trial by an impartial jury as provided by the Sixth Amendment.

The trial Court abused its discretion when it denied defendant's motion for a new trial based on his allegation that he had been denied a fair trial by an impartial jury, and when it denied his motion for a *full investigation* of Juror No. 7, and whether or not the jury had been improperly influenced by the husband of Juror No. 7.

Defendant moved for a New Trial (R1341a) for, amongst other reasons, that the jury and particularly Juror No. 7, had been improperly influenced by contact with an unidentified person (who later turned out to be her husband), who had sat in Court during the entire trial (R1342a), heard all the motions, when the jury was excused, spoke with Government witnesses during recesses and was seen conversing with the United States Attorney in charge of the prosecution of the case. Defendant moved to investigate Juror Number 7, Mrs. Crismale, under Rule 19(g) of the General Rules of the United States District Court for the District of New Jersey.

Rule 19(g) provides:

> "G. No attorney or any party to an action or any other person shall himself or through an investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown."

The defendant submitted his own affidavit (Appendix D, A69a; A70a), and that of his brother, Marvin Hecht (R1343a), in support of his motion (R1342a) to investigate Juror Number 7 and to grant him a New Trial on the ground that he had been deprived of a fair trial by an impartial jury. The motion for a new trial was denied (R1347a), on October 3, 1967, but the Court did grant defendant's motion to investigate Juror Number 7 and an unidentified person, presumably the husband of Juror Number 7, to the extent of ruling that the Court would interview Juror Number 7 and the unidentified person to aid it in determining whether there was just cause under the Rule (R1347a).

The Affidavit of Marvin Hecht (R1343a) recites that he had no awareness of who the unidentified person was until he saw him (R1344a) speak to Juror No. 7 after the verdict when she greeted him before going into the elevator. The trial which stretched over a four week period, was attended by this unidentified person every day and during the course of the trial, during recesses (R1344a), for motions and argument. The unidentified person had been speaking to witnesses for the prosecution such as: witnesses, Metzheiser and Redfield. He also had been seen talking to an attorney, who represented Edward R. Burt & Co., the former accountants of he Citizens National Bank, who also attended the trial every day. In the affidavit, it is recited in Paragraph 6, that the unidentified person had been speaking with the Assistant United States Attorney, who prosecuted the case.

The Affidavit of Milton Hecht, the defendant (A69a) repeats substantially the same matters recited above.

As a result of the Court's Ruling (R1347a) to interview the unidentified person and Juror No. 7 to aid it in determining whether there was just cause under the Rule,

a Hearing was held on November 13, 1967 (Appendix E, A71a). All questioning was done by the Court but the Attorneys were permitted to suggest questions which were adopted by the Court.

The Court first questioned Estelle Crismale (after excluding her husband from the courtroom) (A71a; A72a) and in the course of the questioning, she testified that her husband attended the trial every day and drove her to Court and home every day. She testified that her husband had a heart attack and she did not desire to leave him at home alone. She denied that she ever discussed the case with her husband (A73a; A74a) but had discussed with him (A74a) the addresses of fellow jurors, "what the girls did in the jury room, thinks like that." When directly asked whether she had ever discussed the case with her husband (A74a) she replied "No, he didn't have to. He heard as much as I did." She testified her husband reported to her that someone had asked him what his wife thinks about the case and he had replied, that he doesn't talk it over with his wife. She testified that her husband had told the stranger that his wife was a Protestant, that he was a Catholic, she was a Republican and he was a Democrat and it would cause "arguments" to discuss the case with his wife (A74a).

She testified that her husband never told her about any conversations that he overheard in the corridor relating to Mr. Hecht and that she didn't think he heard any. She denied having ever communicated to any other members of the jury anything she may have seen or heard or was told happened outside the Courtroom, or during periods of jury exclusion, in the court room.

Mrs. Crismale testified that she and her husband had eaten lunch together with *three other ladies* of the jury (A75a to A76a) but denied that the case had been dis-

cussed. On another occasion, she testified that she and her husband had had lunch with a juror named, "Ann" (A76a), but denied that the case had been discussed, as it was "crowded" in the restaurant. She asserted that her husband could not have been with any witness without her knowledge (A76a) and argued (A76a) that her husband had had no opportunity to have conversations with witnesses in the case.

The husband of Juror No. 7, Mr. Vito Crismale, was sworn as a witness (A78a). He testified that he had come to Court every day but not every day in the particular Court room in which his wife was a juror. He testified that he heard the lawyers argue with the Court during recesses (A78a) outside the presence of the jury. He stated that he did not pay much attention to the arguments out of the presence of the jury (A79a), and denied having ever reported anything that occurred outside the presence of the jury, to his wife. Mr. Crismale denied having talked to anyone during recesses in the corridor except to one person and that one person had asked him what his wife was doing. Mr. Crismale testified that he replied to this stranger, that his wife is a Protestant and he was a Catholic. He denied having talked to any of the witnesses in the corridor (A79a); and denied specifically having talked to Mr. Metzheiser or Mr. Redfield. Mr. Crismale denied having talked to Mr. Horowitz, Assistant U. S. attorney (A80a). He denied having reported anything to his wife concerning what he may have heard in the corridors of the Courtroom (A80a). Mr. Crismale denied again that he had spoken to Mr. Horowitz, Assistand U. S. Attorney, while the case was going on (A80a). Mr. Crismale could not remember whether or not he had had lunch with any other members of the jury, in addition to his wife (A80a).

During the argument on the Motion the Assistant U. S. Attorney, Mr. Horowitz, conceded (A84a; A85a) that he

had a conversation with Mr. Crismale but that it consisted of only one conversation with him while the jury was deliberating (A85a).

Defendant moved the Court to allow a more elaborate Hearing on the issue of whether or not this Defendant had been deprived of his constitutional right to an impartial jury (A82a) and argued that he *had a right to* a more extended Hearing to prove that Mr. Crismale had had conversations with the United States Atorney and the Government's witnesses, Mr. Metzheiser and Mr. Redfield, as well as the Attorney for Edward R. Burt & Co., the former accountants for Citizens National Bank, and that ultimately juror Number 7 had been influenced by her husband's report thereof.

The Defendant wanted a more extensive Hearing (A82a) to demonstrate that Mr. Crismale was not telling the truth (A83a) when he testified and denied having conversations with Government witnesses Metzheiser and Redfield, the United States Attorney, and his wife Juror No. 7 concerning the case. The Defendant wanted an opportunity to question Government witnesses, Metzheiser and Redfield (A83a; A84a). A full Hearing would have demonstrated that the husband attended all the Motions and Arguments (a matter which concerned the Court very deeply (A87a)) and an examination of the other lady jurors, who had lunch with Juror No. 7 and her husband would have demonstrated that the case had in fact, been discussed to the prejudice of the Defendant, Hecht. The extreme attempt of Mrs. Crismale to protect her husband and any communication she may have received from him, is exemplified by her testimony when she testified "I mean he couldn't have been with any witnesses without me" (A76a), and when she continued to argue with the Court that she knew his movements while she was excused from the jury box during the Hearing of Motions or when the jury was secluded during recesses for Motions (A76a; A77a), or when her husband was in the corridor.

It was an abuse of discretion by the Court to deny the Motion for a more extended Hearing, when the Court denied the Motion (R1372a) and it was an error to deny the Motion for further leave to investigate Juror No. 7 (A90a) under Rule No. 19 (g), and to examine other jurors and witnesses.

According to the testimony, Rule No. 19 (g) had already been violated by the mere fact that any person questioned "any juror, relative, * * *" during the pendency of the trial * * * and certainly, there had been a *prima facie* showing that the United States Attorney had violated the Rule when he had had a conversation with Mr. Crismale (A84a; A85a), as conceded by him.

Rule 19 (g) was violated when Mr. Crismale discussed with his wife the "addresses" of other jurors and "what the girls did in the jury room, things like that." (A74a). The defendant had shown good cause under the Rule for a full investigation of all the Lady Jurors, and to explore fully all the facts to determine whether or not he was entitled to a new trial on the ground that he had been denied an impartial jury as prescribed by the Sixth Amendment to the Constitution of the United States. The very fact that the husband *Mr. Crismale, never talked to anyone on the Defense side,* reflected his partiality towards the Prosecution. The unbelievable testimony of Juror Number 7 and her husband, on vital matters, reflected an integration of their roles so that it became a mere formalism as to whether the conversations were between a Juror or her husband in separate psychological compartments.

All the Government's witnesses violated Rule 19 (g) by talking to a relative of a juror and did so, without judicial control. The affidavit of defendant Hecht has not been refuted by a partial hearing. It has been fortified by it.

In determining whether defendant is entitled to a new trial because of conversations of Government witnesses with members of a jury, the judge's conclusion may not rest entirely upon testimony of jurors, with respect to whether they were influenced because that alone is too uncertain a basis for resolving the issue of prejudice.

Ryan v. *United States, Duncan* v. *United States,* U. S. Ct. of Appeals, D. C. Cir., 191 F. 2d 779 (1951).

> "The evidence shows that such conversations did occur between the prosecuting attorney and some members of the jury. This raised a presumption of prejudice. We so conclude from the discussion in Mattox v. United States, 1892, 146 U. S. 140, 147-150. 13 S. Ct. 50, 53, 36 L. Ed. 97, where it is said:
>
> > 'Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Ryan* v. *United States, supra,* 780.

In *Ryan* the conversations were innocent (on the part of the U. S. attorney) and consisted of "bantering exchanges regarding an unrelated case being handled by the prosecuting attorney in the Court of Appeals."

> "But the reasons for the presumption of prejudice apply to such communications because they too bring the impartiality of the jurors into question. So we think the presumption itself applies notwithstanding the conversation did not relate to the case on trial. The presumption, however is rebuttable." *Ryan* v. *United States, supra,* 781.

In *Ryan* v. *United States,* the trial court held an "extensive hearing" (*supra* 781) and did not rely entirely

on the conclusions of the jurors as to their impartiality. *Ryan* v. *United States, supra,* 781, 782.

In the case, *sub judice,* the defendant was denied an "extensive hearing" and there was no rebuttal of the presumption of prejudice, by the Prosecution.

Mr. Crismale did testify that a stranger asked him what his wife thought of the trial (A79a), and this could have been one of the Government witnesses, Mr. Metzheiser or Mr. Redfield. Mrs. Crismale (Juror No. 7) learned of this communication (A74a) and did not report it to the Court as the Court had instructed the Jury (B120a).

Government witnesses are not allowed to "communicate" directly or indirectly with a juror, or a relative of a juror (Rule 19(g)).

> "The same is true if the communication with the juror was from a witness, rather than an officer of the court." *United States* v. *Guthrie,* 387 F. 2d 569, 572.

An *Ex Parte* affidavit or statement by the Government is not an adequate method for determining that the communication was clearly not prejudicial. *United States* v. *Guthrie, supra,* 572. In *Guthrie, supra,* there had been a conversation between an F.B.I. Agent and a juror during a Court recess. Defendant made a Motion for a Re-Hearing pursuant to Rule 33 of the Federal Rules to determine whether such conversation had prejudiced the defendant, and the motion was denied. The Court of Appeals was of the opinion that the defendant was entitled to a hearing and an opportunity to cross-examine, citing *Homes* v. *United States,* 284 F. 2d 716, 718, 97 A. L. R. 2d 782 (1960), to the effect that private communications are:

> ". . . an occurrence which can not be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." *United States* v. *Guthrie, supra.*

The defendant's motion for a New Trial (R1342a) asserted he had been deprived of a fair trial by an impartial jury as the result of improper influences upon Juror Number 7, Mrs. Crismale and this motion was denied (A1347a). A motion for an extensive hearing to investigate Juror Number 7 (A90a) was denied.

It does not matter that jurors testify that they were not influenced:

> "However, if the occurrence is such as to be so inherently unfair as to reflect on the jury system, we think a mistrial should be declared, or as the matter was handled by the court here, a new trial should be granted over and above the rights of the litigants. The jury system could not long survive abuse of the type here made out."
>
> *United States* v. *Harry Barfield Co.*, 359 F. 2d 120, 123 (C. C. A. 5th Cir.) 1966.

A minor social contact with the Assistant U. S. Attorney, (not involving the case—during a recess), was held Plain Error under Rule 52(b) F. R. Crim. P. even in the absence of objection, and aside from any Rules. The Court stated:

> "We treated the conduct as prejudicial per se and not subject to being overcome by a showing of harmlessness."

"Such conduct is not only inexcusable, it is clear grounds for the setting aside of a conviction."

Pehar v. *United States,* 315 F. 2d 319, 322 (C. C. A. 5 Cir. 1963).

"The government having admitted that a communication between the bailiff and the jury had taken place, had the burden of establishing by competent evidence that the communication was in fact harmless." *Wheaton* v. *United States,* 133 F. 2d 522, 527 (C. C. A. 8 Cir. 1943).

The Court's denial of defendant's motion, ruled out additional evidence of conversations between the juror's husband with other female jurors when he went to lunch with them, and ruled out a full hearing to determine from the testimony of Government's witnesses who had talked to the husband, what the nature of the communications was. The defendant's affidavit remains uncontradicted, and he has shown good cause at the hearing, for a full investigation. He has raised a rebuttable presumption that the communications were prejudicial to the defendant. The Government did not rebut that presumption. The social climate of good will cultivated by the husband of Juror No. 7 did not include the defendant. The District Court abused its discretion when it denied the motion for a new trial and when it denied defendant's motion for a more extended hearing of all the jurors with whom the husband of Juror No. 7 had had lunch, and of all the Government's witnesses with whom the husband had had conversations (including the Assistant United States Attorney).

"It is vital * * * that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the admin-

istration of justice has been interfered with be tolerated."

Mattox v. *United States,* 146 U. S. 140, 148 (1892).

The defendant's right to an impartial jury, under the Sixth Amendment, has been presumptively violated.

CONCLUSION

Wherefore, for the reasons above stated, it is respectfully urged that this petition be granted.

Respectfully submitted,

FREDERICK KLAESSIG,
Counsel for Petitioner.

APPENDIX A

Opinion of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17166

UNITED STATES OF AMERICA,

v.

FRANCIS J. PAXTON AND MILTON HECHT

MILTON HECHT,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 24, 1968

Before HASTIE, *Chief Judge*, SEITZ and ALDISERT, *Circuit Judges*.

(Filed November 19, 1968)

PER CURIAM.

A jury convicted defendant of conspiring (18 U. S. C. § 371) with one Paxton to defraud Citizen's National Bank

("Bank") contrary to 18 U. S. C. 656[1]. The conspiracy as alleged took the form of an agreement by Paxton, as assistant cashier of the Bank, to allow overdrafts and false credits in favor of defendant personally and his corporate accounts. Defendant appeals the judgment of conviction and sentence, the denial of his motion for a judgment of acquittal or new trial, and from the denial of his motion for leave, pursuant to Rule 19(g) of the General Rules of the U. S. District Court for the District of New Jersey, to investigate the possible misconduct of a juror.

The defendant had a personal checking account with the Bank. Two corporations of which he was an officer were also depositors. During most of the period in which the corporate accounts existed, the defendant was in charge of the issuance of their checks. He was also the Manager of the corporations.

Defendant contends that it was error to admit the testimony of the Government's witness, Metzheiser, the bank auditor. Defendant says first that it violated the best evidence rule because "The Government did not produce the documents on which opinions of the witnesses were based." An issue in the trial was whether certain credits and debits appeared on the defendant's personal and corporate accounts. To prove this "negative" the Government would have been required to introduce voluminous bank

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[1] "Whoever, * * * embezzles, abstracts, purloins or wilfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

records which were, for the most part, on microfilm. Metzheiser personally conducted and supervised the investigation of the accounts and testified at the trial that he found no record of the relevant entries. We think the district court acted well within its discretionary limits in not requiring the production of the original records to prove a negative. We say this because of the record volume involved and the other evidence, both testimonial and documentary, which tended to establish the absence of entries. It is not contended that the original records were unavailable to defense counsel.

Defendant next urges that Metzheiser's testimony, based in part on what he was told by those working under his direction and supervision, was inadmissible hearsay. We think the trial judge was justified in concluding that the testimony was reasonably reliable and its use justified under the circumstances developed by the Government, particularly since the records in question were available to defendant. Nor do we think its use presented any constitutional issue under the circumstances. Defendant's final claim as to Metzheiser's testimony is that it was inadmissible as being an expression of opinion by an unqualified expert. It is true that the Government did not qualify Metzheiser as an expert witness, but it did not offer him as such. We think that the Government was correct in so not offering him. The matters to which he testified were not opinions but conclusions based on particulars drawn from data either observed by him or transmitted to him by those he closely supervised. The data, as we said before, was available to defendant for use in cross-examination.

We therefore conclude that the district court did not commit error in admitting the testimony of the witness Metzheiser.

Appendix A

Defendant's second principal contention is that the admission of certain identified documents and other records under the Business Records Rule (28 U. S. C. § 1732) was in violation of the Sixth Amendment and was an abuse of judicial discretion.

The Government witness, Redfield, the Comptroller of the Bank, testified that the records as to which there is a real question were records kept in the regular course of the Bank's business. We are satisfied that the records whose admission was sought to be justified under the statute were properly admissible thereunder in view of the accompanying testimony.

Defendant's complaint of possible misconduct of a juror is without merit. After making a thorough investigation, the court concluded there was no prejudice to the parties. We have examined the record of these particular proceedings, which were conducted in the presence of counsel, and find no error in the procedure followed by the court, nor in the conclusion it reached.

We have considered the other contentions advanced by defendant and find them to be without merit.

The judgment of conviction of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of Affirmance of Conviction

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,166

UNITED STATES OF AMERICA,

vs.

FRANCIS J. PAXTON,
MILTON HECHT,

MILTON HECHT,

Appellant.

(D. C. Criminal No. 20-66)

On Appeal from the United States District Court for the District of New Jersey

---

Present:

HASTIE, *Chief Judge,* and SEITZ and ALDISERT, *Circuit Judges.*

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 30, 1968, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

November 19, 1968

APPENDIX C

Excerpts from Testimony of Government's Witness Metzheiser

(462d) UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Crim. No. 20-66

UNITED STATES OF AMERICA,

v.

MILTON HECHT,

Defendant.

Newark, New Jersey,
May 16th, 1967.

Before:

The Honorable ANTHONY T. AUGELLI,
U.S.D.J., and a Jury.

(The trial continued pursuant to adjournment.)

(The same appearances as previously noted.)

The Court: All right, gentlemen.

Mr. Klaessig: May I address your Honor?

The Court: Yes.

Mr. Klaessig: I apologize on behalf of the defendant for being late. He says he was delayed in traffic.

The Court: All right. Gentlemen, I guess we are now ready to proceed.

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* All figures in parentheses indicate the number of each new page of Appellant's Appendix in the United States Court of Appeals.

Appendix C

GERALD F. METZHEISER, called and sworn as a witness in behalf of the Government, having been first duly sworn, was examined and testified as follows:

(463a) *Direct examination by Mr. Horowitz*:

Q. Mr. Metzheiser, by whom are you employed? A. Citizens National Bank, Englewood, New Jersey.

Q. And in what capacity? A. As the auditor of the bank.

Q. And for how long have you been so employed? A. The first week in November, 1964, I began my employment with Citizens.

Q. Mr. Metzheiser, I show you Government Exhibits G-1 through G-53 and G-55 through G-114 and ask you have you seen these items before?

(Handed to the witness.)

The Court: The answer is what?

The Witness: I am going to examine them, your Honor.

The Court: All right.

A. Yes, those are checks that—

The Court: No, the question simply was had you you seen them before. The answer is yes or no.

A. Yes, sir; I have.

The Court: Go ahead.

Q. With regard to Exhibits G-4 through G-34, which are checks of the Colortone Photo Service, Inc., have you examined the books and records of the Citizens National Bank in Englewood to determine whether or not those checks were (464a) charged to the account of Colortone Photo Service, Inc., at the bank? A. Yes, sir; I have.

Q. And were they charged to the Colortone account? A. No, sir.

Mr. Klaessig: If your Honor please, I move that be stricken as a conclusion. What did this witness do to determine whether they were charged?

The Court: Well, I assume the records. But let's find out. Let's find out. That was the conclusion he reached, obviously.

I am trying to shorten this thing, gentlemen, if I possibly can. But I do think you should lay a foundation. Did he examine the records? And then what did he see, what did he find?

Mr. Horowitz: If we can do this then collectively.

Q. As to G-1 through G-53 and G-55 through G-114, which are all checks of Colortone, Starbrite and Milton Hecht personally, would you tell us what you did to ascertain whether or not those checks were charged against the respective accounts?

The Court: Give me those exhibit numbers again, please.

Mr. Horowitz: G-1 through G-53 and G-55 through G-114.

(465a) Mr. Klaessig: If your Honor please, I still submit that there is no foundation laid as to who this gentleman is, what his qualifications are, when was he employed by the bank, et cetera, et cetera, before we can even go into that type—

The Court: We know he has been the auditor of the bank since November of 1964. How much more do you want to know about his qualifications?

Mr. Klaessig: What is an auditor of the bank? What are his duties? What qualifies him to investigate this particular material?

Mr. Horowitz: He is not being offered as an expert witness, if your Honor please. He is just going to tell us what he did and what he found or didn't find.

The Court: What are his duties as auditor generally? You might ask that question.

Q. What are your duties as auditor of the bank? A. To review and appraise records of the bank, and to perform internal audits of the bank, and report the result of same to the board of directors of the bank.

The Court: All right. With respect to these particular exhibits that Mr. Horowitz mentioned, what did you do with respect to those exhibits?

(466a) A. Well, with each exhibit we were able to ascertain when the check should have been paid—should have been charged against the account of the respective accounts involved. Searching our microfilm records we determined if any checks in the amount of each check that we were looking at for a two to three or four-week period following the date on which the check should have been charged was actually charged against the account, whether any check in that amount subsequently appeared. And if the same amount did appear we then examined the check that was charged at that time to see if it was one and the same check.

The Court: And you conducted this examination yourself, or was it done under your supervision and direction?

The Witness: Under my supervision and direction.

The Court: All right. And the result is, you say, that none of these checks were charged to the par-

ticular account of either Colortone or Starbrite, is that what you said?

The Witness: Yes, sir.

Mr. Horowitz: Respecting Colortone, Starbrite and Milton Hecht.

The Witness: The respective accounts involved.

Mr. Klaessig: If your Honor please, I move again that that testimony be stricken because the best (467a) evidence of whether they were charged would be the actual bank records. This is merely the conclusion of this witness as a result of his investigation, when the authentic best evidence would be the bank records themselves.

Mr. Horowitz: Well, the answer to that is that there is no record in the bank which shows that these checks were charged. So that therefore it is a matter of bringing all the records of the bank—and that is all the microfilm—we can put in evidence, and we can show the pictures, and you won't find one of these checks on the microfilm.

The Court: In other words, what you are saying is that you can't prove a negative?

Mr. Horowitz: That is correct.

Mr. Klaessig: Your Honor, first of all, I move that the entire little remark of the United States Attorney be stricken because—

The Court: That will be stricken because it is not evidence. He is merely arguing to the Court. It can't be considered by the jury as evidence of any kind.

Mr. Horowitz: Of course, anything I—

The Court: It is merely argument to the Court.

Mr. Horowitz: That is correct. And any time Mr. Klaessig wants, we may have these comments at (468a) sidebar. But I can't argue without—

Mr. Klaessig: Now, your Honor, I was not at fault in this colloquy.

The Court: Neither one of you may be deemed to have been at fault in connection with this colloquy.

The jury will be instructed to disregard the remarks of counsel.

What they say is not evidence. The evidence comes from the witness stand and from the exhibits that you will be permitted to take with you when you retire to deliberate. Nothing else counts, except, of course, the charge I give you as to the law to be applied.

(Brief conference at sidebar, off the record.)

The Court: Before you came to this conclusion you gave us, did you examine the records involving these particular accounts, personally? Either personally or were they examined under your direction and supervision?

The Witness: Under my direction and supervision. A very small amount I did personally.

The Court: All right.

Mr. Klaessig: Now, if your Honor please, does he mean—under his supervision—that he was physically present when these records examined or is he accepting reports from other employees?

The Court: Let's find out by having Mr. Horowitz (469a) ask the necessary questions.

Q. Mr. Metzheiser, were you there physically when the check was made? A. I would say ninety-nine percent of the time. But we went one step further, which may be of help in explaining this, if I may.

The Court: Go ahead.

A. (Continuing) For instance, any check—suppose we found a check for $5,000 that should have been charged against the account approximately—well, take May 16th. We might go for a period of May 16th, say, through June 16th and any $5,000 charge against the account that we saw, we asked the person who was looking for it to take a microfilm picture of the check or of the debit that appeared as a $5,000 item. That picture was compared to the check we were looking for. And if they were different—the check number was different, the payee was different—it couldn't have been one and the same.

Q. And that you did personally? A. Well, all the pictures were shown to me personally; yes, sir.

Q. Then I ask you, lastly, were any of the checks, G-1 through G-53 and G-55 through G-114, found to have been charged against the respective accounts, Colortone, Starbrite and Milton Hecht's personal account? A. No, sir.

(470a) Q. I also direct your attention to G-54 and ask you if you have seen that before? A. Yes, I have.

Q. And did you examine, or cause to be examined, the records of the Citizens National Bank to ascertain whether or not G-54, a debit memo, had been charged to the account of Starbrite? A. Yes, we did.

Q. And what did you find? A. We could find—there was no record to be found supporting the fact that this item was ever charged to the account of Starbrite.

Q. Now, Mr. Metzheiser, I show you G-125 and direct your attention to a debit entry—I'm sorry—a deposit entry of $9,000 on December 1st, 1961. A. Yes.

Q. Did you examine, or cause to be examined under your supervision and direction, the records of the Citizens National Bank in Englewood to ascertain whether or not

there is any record of any deposit in that amount on that date? A. Yes, we examined them.

Q. And will you tell us what you found or you didn't find? A. We could find no record to show that a $9,000 deposit was made on this date to the account in question.

(471a) The Court: What is the account in question?

The Witness: Colortone Photo Service, Inc.

Q. And will you tell us if that had been an actual deposit, what record or records should there have been? A. We should have found a deposit slip bearing the name of Colortone Photo Service showing $9,000 as an amount to be credited to their account.

Mr. Horowitz: I see.

The Court: Did you look for such a deposit slip?

The Witness: Yes, sir; we did.

The Court: And did you find it?

The Witness: No, sir; we did not find any.

Q. Now, Mr. Meitzheiser, I show you G-126 and direct your attention to a credit or purported deposit of $2,000 on June 18th, 1964. A. Yes.

The Court: What account, please?

The Witness: Starbrite Photo Corporation.

The Court: All right.

Q. To do this collectively, would you also look at G-127, and I direct your attention thereon to a credit of $300 on October 27th, 1964, Starbrite account?

The Court: What is the amount?

The Witness: $300.

The Court: What is the date?

Appendix C

(472a) The Witness: 10-27.
The Court: What year?
The Witness: 1964.
The Court: All right.

Q. I ask you to look at G-128 and direct your attention to a credit of $7,500 on January 14th.

The Court: '64, '65?
The Witness: '65.
The Court: How is the account designated? What is the $300 one?
Mr. Horowitz: These are all the accounts of Starbrite Photo Corporation.

Q. I next direct your attention to G-129, and direct your attention to a credit of $12,875.32 on March 1st, 1965. A. Yes.

Q. Next will you look at the same exhibit, G-129, and I direct your attention to a credit of $1,300 on March 24th, 1965. A. Yes.

Q. I next ask you to look at G-130 and direct your attention to a credit of $1,159.38 on April 15th, 1965. A. Yes.

Q. The same exhibit, will you see if there is a credit of $1,060 on April 19th, 1965? A. Yes, sir.

(473a) Q. Look at G-131, and direct your attention to a credit of $7,500 on May 6th, 1965. A. Yes, sir.

Q. G-132 next. Direct your attention to a credit of $7,301.16 on June 15th, 1965. A. Yes, sir.

Q. Next on the same exhibit a credit of $1,650 on June 30th, 1965. A. Yes, sir.

Q. Lastly, I direct your attention to G-133 and direct your attention to a credit of $20,000 on July 13th, 1965. A. Yes, sir.

Q. Now, as to those items you have now just looked at, Mr. Metzheiser, on G-126 through and including G-133, have you examined or caused to be examined records of the Citizens National Bank in Englewood to determine whether there were any records of deposits in those amounts made to the Starbrite Photo Corporation account on those dates? A. Yes, we did examine the records.

Q. And would you tell us what you found or what you didn't find? A. We did not find any deposit tickets to support any of the credits previously mentioned here.

Q. I direct your attention to G-134 and I direct (474a) your attention to the opening balance. Would you tell us what that is? A. $32,156.81.

The Court: What date?

The Witness: It appears to be July 30th, 1965.

The Court: Go ahead.

Q. And I then direct your attention to the closing balance on G-133, and tell us what that date is? A. The closing balance on July 29th is—July 30th; I'm sorry—$22,156.81.

The Court: Wait a minute. You say that the opening balance was $32,156.81 as of July 30th, 1965?

The Witness: It appears to be; yes, sir.

The Court: And the closing balance, did you give me the same date of July 30th, 1965?

The Witness: Well, it is the date of the statement. The last date of the balance on here is July 29th. The date of the statement is July 30th.

The Court: And that amount, you said, was $22,156.81?

The Witness: Yes, sir.

The Court: All right.

Appendix C

Q. Now, have you examined or caused to be examined the records of the Citizens National Bank to ascertain if (475a) there was any support or deposit to explain the additional $10,000 between the opening balance in G-134 and the closing balance in G-133? A. There was no deposit ticket to support the $10,000 change in balance.

Q. Now, Mr. Metzheiser, I show you G-122, which is a ledger sheet of Colortone Photo Service, and would you tell us what the closing balance and the date is on the last sheet of that ledger? A. August 24th, 1961, has an overdrawn balance of $16,331.63.

Q. Now I show you G-124, which is the Recordak copy of a subsequent ledger of the Colortone Photo Service, and ask you to tell us what the opening balance and the date on that ledger is. A. August 24th, 1961, has a good balance of $668.37.

The Court: You said a good balance. What do you mean by that?

The Witness: Not overdrawn.

Q. Have you examined or caused to be examined the records of the Citizens National Bank in Englewood to ascertain whether there was any deposit made to the Colortone account to support that increase of $17,000? A. Yes, we have.

Q. Tell us what you found or didn't find? A. We found no deposit ticket to support the increase in (476a) the balance.

* * *

Cross-examination by Mr. Klaessig:

* * *

(477a) Q. Your testimony on direct examination has been based on the assumption that the records that you

looked at, when you put that film in your machine, and are looking at monthly statements, and you are looking at these records, you are assuming you are looking at genuine true records of the bank, are you not? A. Unless there is something apparently wrong with them that is visible to the eye that makes them otherwise.

Q. Were you not conducting your investigation in the light of what Mr. Paxton had told you on October 11th, 1965, and October 13th, 1965? A. Not completely, no.

Q. But substantially in that light, isn't that so? A. It was directed toward that; yes, sir.

Q. And on October 11th, 1965, Mr. Paxton had told you in the Englewood bank, in the presence of Mr. Endres, and other bank officials, that the surprise bank examiner had found a shortage in his accounts, isn't that so? A. Yes.

Q. And he told you that up to the year 1964 he had been misapplying funds on the basis of holding back checks and not allowing the accounts to be credited, isn't that so? A. If I may—could you repeat the date?

Q. June, 1964. A. No, what date this conversation took place.

* * *

(510a) The Court: Have you looked at them?

Mr. Horowitz: No, I haven't.

The Court: Suppose you both look at them. Do you intend to have them marked as one exhibit?

Mr. Klaessig: Yes, your Honor.

The Court: Just glance at them. They are only to be marked for identification.

It is necessary to know the number of items in this exhibit at this time?

Mr. Klaessig: I would rather have the number of checks, your Honor.

The Court: Well, you have got more than checks in here.

Mr. Klaessig: Yes. I think it is better that we have a number of yellow slips and checks.

The Court: There are ninety-seven items, with a tape attached thereto, all of which at this time will be marked as one exhibit, Exhibit D-10 for identification. There are some additional ones. The total count will be 120. If we have any more like this, I suggest that counsel count the items in advance, agree upon the number, and then offer them for identification.

Mr Klaessig: I will do that, your Honor.

The Court: All right.

(511a) (Exhibit D-10 marked for identification.)

By Mr. Klaessig:

Q. Now, Mr. Metzheiser, I show you D-10 marked for identification and ask you to look at the articles contained in that envelope.

(Handed to the witness.)

A. Yes, I have looked at them.

Q. And, Mr. Metzheiser, these checks are dated in the year 1961, drawn on Colortone Photo Service account, isn't that so? A. I don't know about the year, but they seem to be all Colortone checks.

Q. And they are all paid checks, aren't they? A. I didn't look at them for paid stamps.

Q. Well, you found these checks in the metal file of Mr. Paxton, did you not, on October 13th, 1965? A. Yes, sir.

Q. Didn't you check whether those checks were charged against the account of Colortone? A. I believe that we

found statements with them and they seemed to be charged against it.

Q. But you knew, did you not, that Mr. Paxton was making out false statements? A. Yes.

Q. You couldn't rely on the statements that you saw (512a) in your little microfilm because they might have been false? A. No, that is not true, because whenever a false statement was involved, the false statement as well as the recreated statement was found attached to it.

Q. Did you know that you had all of Mr. Paxton's recreated statements? A. To the best of my knowledge, we had them all. Mr. Paxton himself?

Q. Yes, in the metal file. A. Mr. Paxton's account?

Q. Yes. A. Yes.

Q. No, not Mr. Paxton's account, in the Colortone account. How would you know when the microfilm was only perpetuating a false monthly statement and how would you know it was not? A. I believe on the microfilm copies of statements for the Colortone account that we checked all the credit entries and if the credit entries—we could locate them all—it appeared to be a legitimate statement.

Q. And how would you know when the credit entry that you saw on the microfilm was false or true, if you didn't know— A. Well, if it wasn't there.

Q. And that was the only basis, if it wasn't there, (513a) you decided—you inferred it was not true? A. It wasn't that easy. We went beyond that. We also looked for the physical copy of the deposit ticket itself. Some deposit tickets we had available to use and some on microfilm. And we would make more than one check. Whenever a deposit ticket wasn't found we would note that and then subsequently turn it over to someone else and have them also check for the same thing. So we had two disinterested people looking for it.

Appendix C

Q. How did you know that you had the correct number of deposit slips for the Colortone account? In other words, if someone in the bank pocketed a deposit and caused the deposit slip to disappear, how would you know if that event had occurred? A. I would expect the customer to bring it to our attention.

Q. Did you send in your investigation to all your customers a request to confirm their balance in your bank in 1965? A. Not all of them, but a good majority.

Q. You had 30,000 customers, didn't you? A. Approximately, somewhere around that.

Q. How many did you send out letters to from your bank? A. Me, personally, as the auditor?

Q. No, your bank, that you know of? (514a) A. I would say in the year 1965 probably forty percent, maybe forty to fifty percent got covered.

* * *

(commencing at 532a-25)

Q. Did you represent to this firm of T. D. Davidson (533a) & Company that no reconciliations could be made prior to June, 1964, involving the mechanical system which preceded Burroughs recording, did you represent that to this firm? A. I really don't remember whether I did or not. This is from the T. D. Davision report. I may have said that and I may not. I think it was difficult to go prior to a certain date in reconciliation, but I don't remember what the date was, sir.

Q. Did you represent to this firm—T. D. Davidson & Company—that very limited records are available prior to June, 1964, and accurate reconciliations are believed not possible? A. I think it would have been pretty hard to make a reconciliation prior to June to '64.

Q. So that no one could ever discover what happened

before June, 1964, in any of the accounts of that bank? A. No, that is not true.

Q. What do you mean by reconciliations could not be made? A. Reconciliation, I would assume—

Q. Excuse me.

The Court: One at a time. What was your answer to that question about prfior to June 30th, 1964? Let me hear that question and answer.

(Record read.)

(534a) Q. What I mean, Mr. Metzheiser, the bank, as a total picture, regardless of individual accounts, when it was impossible to make reconciliations because of inadequate records, could anyone determine whether a million, theree million, three hundred thousand, any sum, was missing if no reconciliations could be made? A. You could determine it by selected accounts. Reconciliations, the way they use the term—I can't speak for them, I don't know what they mean, but I would think they are talking about a recap of the whole kit and kaboodle. But I do not know what context they are using reconciliation in.

Q. You know that you need accurate records to make a reconciliation of what is the balance in the bank, what do the depositors hold, and what is owing to the depositors, and what is owing to the bank? A. You would have it on your general ledger statements of condition.

Q. But the general ledger only reflects the accuracy of the bank records, doesn't it? A. The items that are fed to it, that is correct.

Q. Right. And if they are inaccurately fed to them, you get inaccurate record, isn't that so? A. Where?

Q. In your records. (535a) A. Well, the records, if they are inaccurate, they are inaccurate.

Q. If they are false, they are inaccurate, isn't that so? A. The same thing.

Q. Yes. Why were these records—why was it impossible—why were so many records missing before June, 1964; did your bank destroy them? A. When you say so many records were missing, it is not customary for banks to maintain their records for years and years. I don't think any bank keeps their records—

Q. Isn't it a fact that when you put in the computer someone ordered records destroyed in that bank? A. Not that I know of, no.

Q. Wasn't Mr. Paxton in the position to have records destroyed? A. Yes, he was.

Q. Isn't it a fact, Mr. Metzheiser, that the bank was not hiring enough personnel to do the job of auditing, maintaining the bookkeeping department, and checking on its own officials, it didn't have enough men working there for that, isn't that so? A. When?

Q. In 1964, '65, '63, that whole period. A. There seemed to be a sufficient number of people to me.

(536a) Q. Will you tell me what Mr. Redfield's job was? A. When?

Q. During the period you worked there. A. He is the comptroller of the bank—was and is the comptroller of the bank.

Q. Didn't you state to the accounting firms that you were so busy on other matters you couldn't take care of auditing, did you ever state that to anyone? A. No, not to my knowledge.

Q. Were you able to give your full time to auditing? A. As an auditor of the bank, you are not expected to give your full time to auditing. There are other jobs to be done, too, in a managerial capacity. But I would say that I devoted the majority of my time to auditing. But as

far as one hundred percent, I couldn't say. No, I don't think any auditor does.

Q. Were you satisfied with yourself as the only auditor or did you ask your employer to employ help for yourself, before this investigation took place? A. Yes, and I got help.

Q. Did you get adequate help? A. I got enough to get by.

Q. But you were behind in your work? A. Fifty-fifty, maybe.

Q. You wouldn't want to say anything critical of your employer, the bank, would you? (537a) A. If it was true, I would admit to it.

Mr. Klaessig: May I ask, has your Honor ruled yet on a certain matter that was—

The Court: On the "in camera" statements?

Mr. Klaessig: Yes.

The Court: I have not, no. But if you can go on, I intended to do it during recess.

Mr. Klaessig: All right. I will go on.

The Court: All right.

By Mr. Klaessig:

Q. Mr. Metzheiser, did you find any debt memorandum in the hundreds of papers that you found in the metal cabinet, other than G-54?

The Court: You better tell the witness what G-54 is.

Mr. Klaessig: I am going to give it to him, your Honor.

(Handed to the witness.)

Q. Did you find any other debit memorandum than that one? A. Yes, sir; I did.

Appendix C

Q. Do you know where they are? A. This was the only unpaid one that I can remember finding. There were paid ones.

Q. But that was the only unpaid one? (538a) A. Yes. I guess so, this would be the only unpaid one.

Q. Isn't it a fact, Mr. Metzheiser, that because this debit memo, G-54, was unpaid, it was the only reason that you investigated and discovered a deposit slip in the sum of $9,000, namely, G-115? I show you G-155.

(Handed to the witness.)

A. Yes, sir.

Q. And that is—

The Court: What did you say?

The Witness: I just said "Yes, sir."

Th Court: To the question?

The Witness: No. I just said, "Yes, this is it."

The Witness: G-115.

The Witness: Very well. Now, what was the question that was directed to that?

Q. Isn't it a fact, Mr. Metzheiser, that you had a photostatic copy made of the deposit slip, G-115 in evidence, because you had a clue of its possible existence in G-54, that debit memorandum? A. This would be the normal thing to do.

Q. So that it was this memo slip that led you to the discovery of a false deposit slip, isn't that so? A. Yes, sir.

(539a) Q. And if that memo slip had not been in the metal file you would never have known that Mr. Paxton was engaged in making out false deposit slips as well as other operations? A. No, sir.

Q. What does "No, sir" mean? A. It's not true. We would have found it out by other means.

Q. How would you? Suppose he threw away 200 memo slips like this and didn't give you the advantage of finding them in the metal file, how would you have learned of 200 other situations where false deposit slips backed up a false memo slip? A. If all the records were missing it would have made our work quite difficult.

Q. Yes. A. Yes.

Q. It would have been impossible, wouldn't it, to find out what Mr. Paxton was doing? A. Not altogether impossible, no, because you still would have had the credits available to you.

Q. It would have taken years, if he hadn't kindly given you some stuff in his metal file and in his desk? A. Not for the credits. I don't know how long it would have taken for the debits.

Q. And it is only because you believe Mr. Paxton (540a) that you think your investigation is concluded, right? A. Not only because I believe Mr. Paxton, because I am satisfied with the work that was done.

Q. But mostly because you believe Mr. Paxton are you convinced that your investigation is concluded? A. No, sir.

Q. Partially because you believe Mr. Paxton? A. No.

Q. Well, didn't you just testify before that substantially because you believe Mr. Paxton? A. I think that question was put to me in connection with something else. As for the reason of concluding my investigation, I don't believe I answered that before.

Q. Mr. Methheiser, you wouldn't want to compromise any bank officials, would you, by pursuing an investigation? A. I don't understand you.

The Court: That is rather an open-ended question.

Appendix C

Q. You heard Paxton testify in court, didn't you? A. Yes, I did.

Q. Did you, on a number of occasions, hear him say "we" instead of "I"—"we did this, we did that"? A. Yes.

Q. And didn't it amaze you that he said "we" instead of "I"? (541a) A. No, speaking in the context of the bank and himself, I guess.

Q. The bank is a human being and he is the other part of the "we"? A. As two people. It is an expression I think I use myself.

Q. And it was only accidental on the part of Mr. Paxton that he said "we"? A. I don't know what his reason was.

Q. And in your very logical mind, you figure it was the bank itself and Mr. Paxton? A. I never attached any significance to it 'til you just mentioned it. It didn't seem unusual.

Q. Was Mr. Paxton doing a full day's work in the bank as assistant cashier and bookkeeper during the years that he worked there? A. I wasn't his direct supervisor. That would be a little difficult for me to answer. It would be a stab in the dark.

Q. Mr. Metzheiser, isn't what Mr. Paxton showed you in his files and in his desk drawer—just what he showed you—doesn't that involve an enormous amount of work, juggling those situations that he showed you? A. It could and it couldn't. Maybe to a person that worked in a bank all the time—he may look at it a little bit differently than a non-banker. It seemed like work was involved.

Q. If Mr. Paxton hadn't giver you this material in (542a) the cabinet and in his drawer, how many years would it have taken this bank to find out what had happened? A. I don't know. I really don't know.

Q. When you charged somebody for getting Xerox copies of particular items—that is, your bank, I mean—is that a cost or did the bank make a profit at it?

Mr. Horowitz: I don't understand the purpose of the question, if your Honor please.

The Court: It is simply this. When they perform a Xerox service, do they do it at cost or do they make a charge which addsd to the bank's income? As simple as that.

Mr. Horowitz: I understand what the question is.

The Court: Let him answer then, if he knows.

A. It is a standard fee. I don't know how it was arrived at.

Mr. Klaessig: May I have this letter dated March 31st, 1967, addressed to myself from Reeve & Reeve, attorneys for the Citizens National Bank, marked for identification?

The Court: That will be marked D-11 for idenfication. Let me see it when it is marked.

(Exhibit D-11 marked for identification.)

Q. Would this conventional price for Xerox copies of material in the bank, would that apply to records requested (543a) by subpoena, as far as you know, Mr. Metzheiser?

Mr. Horowitz: I will object, if your Honor please. I don't see what bearing this has on this witness' testimony. If Mr. Klaessig has a complaint against the bank, or its attorneys, that can be handled in another manner. How can that affect this witness' credibility?

The Court: If a subpoena is properly issued and properly served, it must be obeyed, provided the

law is complied with. And that carries with it the tendering of a certain sum of money as fixed by law to the person served with said subpoena.

Now, does that answer your question?

Q. Mr. Metzheiser, the accounts of Joseph Minetto and Orlando Minetto involved big contracting firms, didn't they? A. I don't know the personal nature of their business.

Q. Well, when I served you with a subpoena you went and investigated the nature of those businesses, did you not? A. Not of the business, no.

Q. Well, you were trying to determine the amount of of work necessary to get me photostatic records of their accounts, were you not? A. Maybe I didn't hear you, but I thought you were inquiring (544a) as the nature of their personal business.

Q. Mr. Metzheiser, what was the name of that accounting firm that preceded Peat, Marwick, Mitchell & Company in your bank? A. Burt & Company, I believe.

Q. Burt & Company. And you say that was not a CPA firm? A. That's right, sir. They didn't sign themselves as CPA.

Q. Do you know whether it was a CPA firm or not? A. On their letterhead they do not call themselves CPA.

Q. And if they were not a CPA firm then the bank was not employed proper help in the bank for examination of its records, isn't that so? A. That's not true. Many accounting and auditing firms perform bank audits that are accepted and generally recognized as performing a proper function.

Q. Do you know the contractual basis on which Burt & Company was working for the Citizens National Bank, was it on a limited basis or on a full accountant's basis?

A. I don't understand either of those terms. If you could elaborate, please.

Q. Were they employed just to come around and spot check once in a while or were they a full active accounting firm taking care of the bank's business day in and day out? A. Well, not day in and day out. Directors' examination (545a) is usually done once a year. And they employ outside firms to conduct the examination, on a surprise basis.

Q. When you discussed the investigation with T. D. Davidson & Company—and you did discuss it with them, didn't you? A. I talked to two representatives from that company; yes, sir.

Q. Did you at any time represent to them that the investigation is limited to what Mr. Paxton has told us? A. No.

Q. Did you at any time tell them that it was to be an investigation limited only to $372,000? A. No, I couldn't have said that. I wouldn't have known.

Q. Did you tell them it was an investigation limited to the pattern you had set in respect to the investigation? A. My investigation was limited to the pattern?

Q. No, the investigation of T. D. Davidson & Company was to be patterned according to your conception of how the investigation was to proceed? A. Well, no, I couldn't tell them that. They would have to decide that for themselves. They represented the insurance company in this case. They were not employed by the bank.

Q. They were not employed by the bank, but the bank was trying to get money from the insurance company, isn't that (546a) so? A. The bank submitted a claim to its insuror.

Q. Now I ask you did you know that T. D. Davidson & Company was patterning its investigation after the ad-

missions, that is, according to the admissions of Mr. Paxton, did you know that? A. No, I did not.

Q. When you read this report, did you read in the report that they were patterning their investigation according to the admissions of Mr. Paxton?

Mr. Horowitz: Might we know what report we are talking about?

Mr. Klaessig: The report of T. D. Wavidson & Company.

The Court: Representing the bonding company?

Mr. Klaessig: Yes.

The Court: All right.

Mr. Horowitz: Just so I am clear, is this the report we just read for the first time today?

Mr. Klaessig: Yes.

The Court: I will allow it. Go ahead. Did you make that statement or does the report—

The Witness: Could you repeat the question, please?

Q. After reading the report of T. D. Davidson & Company (547a) in court here today, did you learn from that report that T. D. Davidson & Company was patterning its investigation according to the statements of Mr. Paxton? A. I don't know whether they said that or not, really. If I could look at it again, I would—

Q. Would you look at it again? A. Is there a specific place that I should—

The Court: If it is there, point it out to the Witness. We will save a little time.

(Handed to the witness.)

The Witness: And it is in here that they—

Mr. Klaessig: Your Honor, I don't want to take up the time of the Court on this matter.

The Court: All right.

Q. Let me ask you, Mr. Metzheiser, to read the Peat Marwick, Mitchell & Company report. Do you recognize that, have you ever read that? A. Yes, sir; I have.

Q. And do you know that in the Peat, Marwick, Mitchell & Company report they state they patterned their investigation after the admissions of Mr. Paxton, is that right?

Mr. Horowitz: I will object, if your Honor please. That has no bearing—

The Court: That certainly can't in any manner affect what this witness may have said, what appears (548a) in the Peat, Marwick, Mitchell & Company report, unless you relate it to him in some way.

Q. In your affidavit you state, do you not— A. I don't believe Peat-Marwick said they patterned their investigation after Mr. Paxton's admissions.

Mr. Horowitz: Regardless of whether it did or didn't, your Honor, my objection is based—whatever Peat-Marwick did or said in their report, and whatever T. D. Davidson did or said in that report, that has no bearing, or binding effect, or impeaching effect on this witness' testimony, unless he collaborated in the preparation of the report. And there is no evidence that he collaborated in the preparation of that report.

Q. I show you Page—Scope of Investigation—have you found it? A. Yes.

Q. The report states that the comptroller—that was Redfield, right? A. Yes.

Q. —and the internal auditor—that was you, isn't that so? A. Yes, sir.

Q. —assisted them and that they merely reviewed and consulted with you. (549a) A. It says' "As previously mentioned the investigation was primarily conducted by the comptroller and internal auditor of the bank with assistance, review and consultation furnished by us."

The Court: Who is "us" there?

The Witness: "Us" refers to Peat, Marwick, Mitchell & Company.

The Court: All right.

Q. Referring to you here, Mr. Metzheiser, "The investigation as outlined in Exhibit A was patterned by Mr. Paxton's admissions," isn't that in the report? A. Yes, it is.

The Court: Are you at a good breaking point, Mr. Klaessig?

Mr. Klaessig: Yes, sir; I am.

The Court: All right. It is now 1:00 o'clock. The Court will recess until 2:00. Remember my admonition, please.

(Luncheon recess.)

(550a) Afternoon Session

(Whereupon the following proceedings were had at sidebar, out of the hearing of the jury:)

The Court: Regarding the Jencks Act statements, I find that G-159 for identification sufficiently relates to the subject matter of the witness' direct testimony so that it may be handed over to counsel for the defendant.

Appendix C

With respects to Exhibits G-161, 162 and 163 for identification, I find to the contrary, that they do not relate to the witness' direct testimony.

Mr. Horowitz: All right. Now, one further matter while we are at sidebar. I would like to move to strike the last question and answer before lunch which slipped in as we were preparing to go to lunch. The question directly asked the witness—and the reporter can look at the transcript to verify this—if a certain statement was not, in fact, contained in the report. And the witness responded: "Yes, that statement was contained in that report."

The report is not in evidence and there is no evidence that the report was made by this witness. So your Honor has allowed him to look at the reports (551a) and to ask questions with reports that refreshed his recollection, but as to statements actually in the report, not made by this witness, it is not proper cross-examination. I would not want to have Mr. Klaessig be able to say in summation that there is evidence of thus and so, when the statement—the report itself is not in evidence. For that reason I move to strike the last question and the last answer.

Mr. Klaessig: I questioned this witness about the affidavit. And in the affidavit is a paragraph that incorporates the truth of this report—of this accounting firm—as being true in every detail. I questioned the witness as to whether that part of the affidavit is true, and is it a reference to this report, and he stated yes. I am now reading portions of that report, which, in the affidavit—which he admits is a copy of the true affidavit—he incorporates that report as part of his affidavit.

Mr. Horowitz: I cannot believe that to be the fact.

Mr. Klaessig: I will let the Court read the affidavit.

Mr. Horowitz: And it has not been demonstrated here that in the affidavit—of course, which is not in evidence, either—he admits to being party to the (552a) precise words which are in that report. And we are talking about words.

The Court: What report are we referring to, the Mitchell report?

Mr. Klaessig: Yes. And the other one, too.

Mr. Horowitz: There is no evidence that he prepared that report. He may agree as to certain of the factual matters in the report. But that doesn't mean that he can be bound by the conclusions or the statements made in that report by Peat, Marwick, Mitchell & Company. He does not say anywhere in his affidavit, nor on the witness stand, that he prepared that report.

Mr. Klaessig: No, he doesn't. But in his affidavit—I will show the Court the affidavit—he says the report is true in every detail.

Mr. Horowitz: I am sure he didn't say that.

Mr. Klaessig: I will show it to the Court.

The Court: I will cut further argument out by saying that I will defer decision on that until he can locate that particular part of the testimony to find out what was said.

Mr. Horowitz: The last question and answer before lunch.

The Court: Just before we broke.

(553a) Mr. Horowitz: Right.

(Record read.)

The Court: No harm done.

Mr. Horowitz: Yes, there is. The report itself is not in evidence. And I would not want Mr. Klaessig to be able to say on summation that by this witness' very admission the investigation of Peat-Marwick and T. D. Davidson was patterned after Mr. Paxton's admissions, because that is not this witness' testimony. That is Peat-Marwick's conclusion.

Mr. Klaessig: He adopts it, your Honor.

Mr. Horowitz: He does not. The affidavit is not in evidence, nor have I seen it, nor has the Court seen it.

The Court: All right. The ruling will be deferred until I have a chance to read the affidavit, and look at the reports, and also to reconsider the last question and answer that I heard here at sidebar.

In the meantime you gentlemen will govern yourselves accordingly until I rule.

(Court and counsel withdrew from the sidebar and the following proceedings were had in the hearing of the jury:)

The Court: All right.

Mr. Horowitz: In accord with your Honor's ruling, (554a) the Government is at this time turning over to the defense the exhibit which had previously been marked as G-159.

(Handed to counsel.)

The Court: You may proceed, Mr. Klaessig.

Appendix C

GERALD F. METZHEISER, resumed.

Cross-Examination (Continued) *by Mr. Klaessig*:

Q. Mr. Metzheiser, I show you D-1 for identification, and I ask you whether or not you recall that when you made out the original affidavit was there attached to the original affidavit a copy of the report of Peat, Marwick, Mitchell & Company dated December 1st, 1965? A. Attached to the affidavit, no.

Q. Did you refer in your affidavit to the Peat, Marwick, Mitchell & Company report and adopt it in your affidavit as true?

Mr. Horowitz: If your Honor please, just as a suggestion, might we have the benefit of a copy of what we have been talking about?

The Court: I think you ought to look at the affidavit. I think the Court should have a copy, also. Perhaps before the Court looks at it, show Mr. Horowitz a copy of the affidavit.

(Shown to counsel.)

(555a) The Court: The name of that accounting firm is Peat, Marwick, Mitchell & Company, isn't it?

Mr. Klaessig: Yes, your Honor.

Q. I refer your attention, Mr. Metzheiser, to Paragraph 17, which reads, "Attached to my affidavit is a copy of the report of Peat, Marwick, Mitchell & Company"—

Mr. Horowitz: Let him read it.

The Court: Is Paragraph 17 referred to then?

The Witness: Yes. Would you like me to read it?

Appendix C

The Court: Read it to yourself.

(Witness examines document.)

The Witness: Yes.

Q. And do you state that that report is, to the best of your knowledge, true in every detail and you adopt the same, is that right? A. Yes, sir.

Q. I ask you Mr. Metzheiser, to look at Government Exhibit G-32.

(Handed to the witness.)

A. Yes.

Q. And was it your testimony in connection with G-32 that you concluded no charge was made against the account of Colortone? A. For this check?

(556a) Q. Yes. A. That is correct.

Q. Isn't it a fact, Mr. Metzheiser, that you never found the bank statement for that G-32, for the month of G-32?

The Court: Well, what was the month of G-32, first?

Mr. Klaessig: February 5th, 1963.

A. There were some items which we could not trace to the depositors' statements because the statements weren't available.

Q. And that was one of them? A. I don't know. It could be.

Q. Would it refresh your memory to look at the Pea - Marwick report? A. It would be in there.

(Handed to the witness.)

Q. And there were quite a few items, and yet you testified with respect to G-31 that your conclusion that they

were not charged against the account was because you saw the statement and there had been no charge, isn't that so?

Mr. Horowitz: I object.

The Court: Wait a minute.

Mr. Horowitz: Are we talking about G-32 or 31?

(557a) The Court: What are we talking about?

Mr. Klaessig: G-31, your Honor.

The Court: Well, you just had a reference to G-32.

Mr. Klaessig: 32, I mean.

The Court: All right. Now, G-32 is a check dated February 5th, 1963. Give me a little more information. How much?

The Witness: $1,050 payable to Lou Jacobs, signed by Milton Hecht, Check No. 3359, drawn on the account of Colortone Photo Service.

The Court: All right.

By Mr. Klaessig:

Q. I refer you to Schedule 4 of the Mitchell report, as incorporated in D-1 for identification, and ask you would it refresh your memory concerning G-32 to look at that schedule? A. 3359, that check is listed on here.

The Court: Keep your voice up, please.

The Witness: That check is listed on the Peat-Marwick report.

Q. As a check for which a bank statements was never found? A. Yes, sir.

Q. And in your affidavit you adopted the factual findings of this report, isn't that so? A. Yes, sir.

Appendix C

(558a) Q. And you testified in court this morning that you based your conclusion that there was no charge because the charge was not on a bank statement in reference to G-32. A. Or on microfilm.

Q. Or on microfilm. A. Right.

Q. But you couldn't find any bank statement or microfilm of the bank statement? A. We couldn't find any bank statements or microfilm of bank statements, but microfilms of checks were available.

Q. But a microfilm of the bank statement that would have covered G-32 you never found, isn't that so? A. That is correct.

Q. And because you never found a bank statement, are you putting that check in the same category as in your investigation where you found a bank statement and there was no charge? A. Not specifically, no.

Q. You are concluding then that there was no charge against Colortone because there was no bank statement in the files of the bank, is that right? A. Not for that reason alone.

Q. What is the other reason? A. Well, as I mentioned, we would also be searching the microfilm records for debits against the account of Colortone, (559a) or Starbrite, or Milton Hecht.

Q. But that isn't what you testified this morning in relation to G-32, is it? You made it very simple. It was not on the bank statement and therefore it was not charged. A. In that respect, yes.

Q. And in respect to G-31, will you refresh your memory? A. Yes.

Q. And in respect to G-31, if someone had destroyed the bank statement, and you couldn't find the bank statement, you concluded, therefore, G-31 had not been charged against Colortone, right? A. Not based solely on the bank statement missing itself.

Appendix C

Q. But this morning you testified, without implying that the bank statement had never been found, right? A. Could you repeat that, please?

Q. When you testified this morning in relation to G-31, you stated that it was your conclusion it had not been charged against the account because the bank statement didn't reflect that it had been charged against the account, right? A. I don't remember my exact words, but it would be along those lines. But then I failed to mention that we also were tracing—I believe I did mention that we traced these through the microfilm records of checks. I recall mentioning that (560a) this morning, that we employed more than one procedure.

Q. Now I ask you, Mr. Metzheiser, to again look at the Colortone account in the Mitchell report and refresh your recollection as to whether a bank statement was ever found in relation to G-31, the schedule for Colortone? A. G-31 appears on here with an asterisk next to it. And the asterisk explanation is "Items not traced specifically to deposit statements as statements were not available."

Q. They were lost, or they couldn't be found? A. They couldn't be found.

Q. Or they might have been destroyed? A. I don't know.

Q. Would you have concluded, Mr. Metzheiser—if you knew a record had been destroyed, would you have then concluded that G-31 was not charged against this account, Colortone account; if you had known that it had been destroyed would you have then concluded that? A. Not on that basis alone.

Q. I refer you to G-111. A. I don't seem to have G-111 in here.

Q. Let's look at G-34 while I am finding it.

Appendix C

The Court: G-111 ought to be handy, too, shouldn't it?

The Witness: I don't seem to have G-34, either.

Q. Let's go to the Milton Hecht account. Will you (561a) look at these exhibits?

The Court: Numbers, please. What are they?

The Witness: G-111, 112, 113 and 114. Four checks drawn on the account of Milton Hecht.

The Court: All right.

The Witness: Various dates and amounts.

The Court: All right.

Q. Did you testify this morning in respect to those checks that you concluded that they had never been charged to the account of Milton Hecht because the bank statements for the particular month of the dates of those checks did not reflect such a charge, did you so testify? A. Not on that basis alone. Again I believe I mentioned the fact that we traced the checks to microfilm records.

Q. Yes. And microfilm records of the monthly statements of— A. Of checks.

Q. Of checks and the monthly statements. A. There was more than one basis for determiinng whether or not a check was unpaid.

Q. Mr. Metzheiser, you went down a whole list of exhibits in sum, did you not, when you were testifying this morning? A. I looked at each check.

Q. You did not testify this morning that you did not (562a) find monthly statements in reference to G-111, 112, 113, 114, did you? A. No, I didn't testify to that.

Q. Now I ask you to refresh your recollection as to whether or not you actually found monthly statements in reference to that account; I refer you to Schedule 5 and ask you to compare the checks.

The Court: Schedule 5 of what?
Mr. Klaessig: Of the Peat-Marwick report.
The Court: D-1 for identification?
Mr. Klaessig: Attached to D-1.
The Court: All right.

A. Yes.

Q. And I ask you whether you found any monthly statements in respect of these Milton Hecht checks, G-111 to 114, inclusive. A. No, we did not.

Q. And did you this morning conclude, primarily, that these checks, G-111 to 114 were not charged to the accounts because you examined the monthly statements and did not find them charged to these accounts, did you so testify? A. I do not believe I restricted myself just to the monthly statements. I also mentioned that we tried—attempted to trace checks to the microfilm records to find out what checks (563a)[1] were actually paid against the account.

* * *

(commencing at 567a-23)

Q. When you became familiar with Mr. Paxton's operation, didn't you conceive of the fact that he could have failed to charge a check against Colortone or Starbrite in one month (568a) and put the charge in three, four months later, the way he was operating? A. I am not too sure—Could you repeat it, please?

Q. Let me ask you, how long have you been an auditor? A. In this bank?

Q. Any bank. A. It goes back fifteen years ago, maybe.

Q. And you have had a lot of experience—fifteen years of experience, auditing? A. Approximately. I never thought of it that way.

Appendix C

Q. Then I will repeat the question. You knew that Paxton was engaged in all kinds of manipulations, and you, in order to determine whether a check had not been charged against Paxton's account—I mean Hecht's account—in Starbrite, Hecht or Colortone—would look up three weeks after the date of the check—meaning G-1 to G-114 in evidence, right? A. Yes, we would go to a period beyond that.

Q. You didn't testify you went to a point beyond three weeks this morning? A. I meant three to four weeks. I am sorry. That's what I meant to say.

Q. Yes. Didn't you conceive of Mr. Paxton putting the charge in three months later or six months later? A. There were some items we traced out that—it would be (569a) very few, though—that went maybe three months later, maybe four months. But there was a very small number that we did it that way.

Q. But you would have to check every one of Mr. Paxton's account to get the pattern of whether or not these 114 checks had to be analyzed and investigated beyond the month of their date, wouldn't you? A. Beyond the month? Not all the time.

Q. No, bu' I mean it is conceivable that many of these checks that you have concluded were not charged to the account, because you didn't find them charged to the account within a period of three, four weeks, it is conceivable that that conclusion is wrong on your part, because they may have been charged in later months, isn't it conceivable? A. I would say the odds are against it.

Q. Yes, that is your guess, the odds. That saved you work. A. No.

Q. Those odds? A. No, not only me.

Q. Some of the checks you only investigated within a three or four-day period, Mr. Metzheiser, isn't that so? A. I don't believe it was that short.

Appendix C

Q. You don't believe it was that short? (570a) A. No.

* * *

(commencing at 1137a-15)

Mr. Klaessig: Your Honor, this document now has developed into the most critical document in the case, as far as the defense is concerned. The defense at no time concedes Mr. Paxton was on vacation at any period in the early part of August 1965. The State is now being embarrassed by the fact that Mr. Paxton identified a document dated August 11, when he, according to his other testimony, as away on vacation.

This document—the testimony of Mr. Paxton was created by Mr. Paxton. And if it was not created by Mr. Paxton, it was created by a confederate of Mr. (1138a) Paxton in this bank.

I object to the withdrawal of that document. On my motion for acquittal I intend to argue the motion in terms of moving for the dismissal of all 148 documents. But unless all 147 documents are dismissed, I absolutely oppose any withdrawal of this document. It is the most critical document in the case, from the defense viewpoint. And it is already admitted in evidence. And it has the greatest potential for the defense to prove that Mr. Paxton was in the office August 11, 1965, and produced that document, and that it is his creation.

The Court: Notwithstanding the testimony that he went on vacation either the 9th or 10th, is that it?

Mr. Klaessig: Yes, sir.

The Court: Denied.

Mr. Horowitz: Okay.

Appendix C

(The Court and counsel withdrew from side bar and the following proceedings were had in the hearing of the jury:)

GERALD F. METZHEISER, recalled as a witness by the Government, in rebuttal, having been previously duly sworn, was examined and testified as follows:

(1139a) *Direct examination by Mr. Horowitz*:

Q. Mr. Metzheiser, did you search, or were you present when Mr. Paxton's desk was searched on October 11, 1965? A. Yes, sir; I was.

Q. And who was there with you? A. Mr. Redfield from the bank and two agents from the Federal Bureau of Investigation.

Q. Who were those agents? A. Mr. Christensen was one agent and the name of the other agent escapes me. I just don't recall.

Q. Mr. Christensen, who is sitting here, is that correct? A. Yes, sir.

Q. Do you recall, of your own knowledge, how many checks were found in Mr. Paxton's desk on that occasion? A. Four.

Q. And I show you G-1, 2 and 3, and D-7, and ask you if those are the checks? A. Yes, they were, these four checks.

The Court: May I see them, please?

The Witness: Yes, sir. Further—

The Court: No, that's enough. Just wait till I look at them.

A. (Continuing) I don't know who actually opened the draw, but there were four of us standing there. And I

(1140a) recall that the two agents picked up the checks first. And one of the agents initialled them and dated the back of the checks.

Q. And do you recall which agent initialled the checks? A. It was John Christensen.

Q. And are there such initials on the back of each check? A. All four checks have "J.C." on the back of the check, followed by the date 10-11-65.

Q. I see. And were those initials and date put on the back of those checks in your presence? A. Yes. Yes, sir; they were.

Q. Now, I show you D-2 in evidence and ask you to tell us what it is. A. This is a check drawn on Starbrite Photo Corporation, No. 170, dated August 4, 1965, payable to Eastman Kodak Company in the amount of $30,811.55, and signed by Milton Hecht. And there is a—am I responsible for the letter? There is a letter attached to it, dated August 24, 1965.

Q. Right. Now, do you know when that check came in to the Citizens National Bank in Englewood? A. Well, during the course of our investigation we determined that the check was first shown on the account of Starbrite Photo Corporation on August 9, 1965, and was subsequently "rtd"—what we call "returned," shown as (1141a) a return check that day or the following day.

* * *

(1142a) The Court: Yes. And then that clearing house, in turn, would return it to the bank where the payee originally deposited it.

The Witness: The bank of first deposit.

The Court: And then from there the bank returned it to the payee, Eastman Kodak, is that correct?

The Witness: Yes, your Honor.

The Court: All right. In other words, in the ordinary clearance transaction, that represents a typical example of the route that a check takes that has insufficient funds, isn't that so?

The Witness: Yes, your Honor.

The Court: All right.

By Mr. Horowitz:

Q. Now, Mr. Metzheiser, who did most of the work on the investigation that you and Mr. Redfield conducted? A. Well, if you had to say who did a little bit more than the other, I guess it probably would have been me. But I couldn't say how much more. But I probably did more. My job didn't require, you know, the day to day presence that Mr. Redfield's job did.

Q. Okay. During the course of your investigation did you ascertain how the account of, let's say, Capasso Brothers was used to hide differences in the Starbrite or Colortone account? (1143a) A. Yes, sir; we did.

Q. And could you tell us how it was used? A. Well, the most concrete period that I could talk about would—say, from June of '64 on. Prior to that it was maybe a month to month basis. But starting with June of '64 it ran for—maybe ten months, eight months, approximately, where in June of 1964 all of the bank's bookkeeping records were on a computer. And in the appropriate time of the month the computer would produce statements for various accounts. The statement that was produced for Capasso Brothers, that was originally produced by the computer, never was mailed to Capasso Brothers. The statement that was eventually mailed to Capasso Brothers was a statement prepared on a typewriter. And the difference between the two closing balances in those accounts was a certain amount each month, some months it would

increase, until eventually it just disappeared. And by that means the customer was getting a balance that showed the correct—that showed him the balance that he thought he had in the bank, but it was really not the true balance.

The Court: Let me ask this, if I may, Mr. Horowitz. The computer produced, as you say, a statement. And we are talking about the usual and customary monthly statement of a customer of a bank.

The Witness: Yes, your Honor.

* * *

(1153a) Mr. Horowitz: St. Therese's came out ahead.

The Court: I see. All right.

Mr. Klaessig: I move that be stricken, Mr. Horowitz' statement that St. Therese's account came out ahead. There is no evidence to support it.

The Court: Yes. We will strike that as being a remark made by counsel. What I am talking about—I merely asked whether or not St. Therese's account was considered as one of those "innocent accounts."

Mr. Horowitz: It's a poor use of words, but—

The Court: I didn't invent the word.

By Mr. Horowitz:

Q. So that, in any event, to sum up, it is your testimony that as of March or February of 1965, as best as you can determine, no account in the bank was deflated, decreased to hide any increases to any other accounts by Mr. Paxton?

Mr. Klaessig: I object. Are you through, counsel?

Mr. Horowitz: Yes.

Mr. Klaessig: I object to this question. It calls for a conclusion on the part of the witness, who has never issued a written statement or report, who has no working papers in his presence on the witness stand, and is giving us a verbal conclusion, who uses semantic expressions like "adjust" and a debit that (1154a) doesn't debit, I submit the man is not qualified to give us that conclusion.

The Court: Let me hear the question again.

Mr. Horowitz: I will withdraw the question.

The Court: Yes. All right.

Q. Do you have work papers with you supporting the statements you are making? A. Yes.

Q. Could you bring them forward? A. Yes.

(Witness leaves stand and returns with papers.)

The Court: All right, Mr. Horowitz.

Q. Now, Mr. Metzheiser, do you have the work papers with you? A. Yes, sir.

Q. Okay. Did the results of your investigation reveal any accounts, if any, that were used by Mr. Paxton subsequent to February or March 1965 to hide unauthorized increases or additions to other accounts?

Mr. Klaessig: Your Honor, I object to the question on the ground that there is not a proper foundation laid that this witness has made an investigation of such dimensions as to qualify him to reach such a conclusion.

The Court: I will have to sustain the objection. (1155a) The mere possession of work papers in his

lap doesn't help the question at all. The objection will be sustained.

Q. Mr. Metzheiser, tell us what, as best you can recall—

The Court: Pardon me, Mr. Horowitz. You turned away there. I am not too sure that the reporter got that. What was the question?

Mr. Horowitz: I will reframe it.

The Court: All right. It is going to be reframed.

Q. Did you look into the activity in the Coffin Turbo Pump account? A. Yes, sir.

Q. And in the Capasso Brothers account? A. Yes, sir.

Q. And the NBC Broadcasting account? A. Yes, I looked at them. You used the word "activity." I don't know what you necessarily mean by that.

Q. Well, did you look at them to ascertain whether or not these accounts had been used by Mr. Paxton to hide differences? A. Yes.

Q. Would you tell us what other, and approximately how many, accounts you examined? A. Gee, I really couldn't recall. It might run anywhere (1156a) from maybe ten to fifty on an immediate investigation, and then relying on normal accounting procedures to turn up the rest, which would encompass a much larger amount. But the number of accounts that would be involved in that would be not very determinable. But through normal accounting procedures—for example, confirmations, we would rely on those to turn up other irregularities.

Q. I see. Of the accounts that you looked at specifically—and by those I mean—Strike that. I will withdraw the question. Did you look at specifically the accounts for which you have found ledger cards in Mr. Paxton's locker?

A. It was based on what we found that day, and in what condition we found them, and a continuing record of what we found. For instance, maybe if we found just one or two ledger sheets of a particular company, that necessarily wouldn't have any significance to us. Maybe we would just have somebody check that out against the closing microfilm balance, and if they were the same there wouldn't be any need to go any further.

Q. I see. A. I would say there wasn't a general statement that could cover each account.

Q. But you did check the Coffin Turbo Pump account thoroughly, is that correct? (1157a) A. That's one of them, yes.

Q. Did there come a point in time when you ascertained the account was no longer being used to hide differences? A. Yes, sir.

Q. And can you tell us what that point in time was? A. Well, that would be September or October 1964. September 1964, I would say, from my work papers here. During the month of September 1964 the closing statement that went out—9-30-64—reflected the true balance in Coffin Turbo, the computer-produced statement.

> The Court: Which was a legitimate statement.
>
> The Witness: Right. Well, the statement that went out was a legitimate one in every respect. Whether it was computer-produced or typewritten, I don't know, but—
>
> The Court: All right.

Q. Now, what about, for example, NBC Broadcasting? A. NBC Broadcasting was used in the—well, this is general recollection now—back in, say, '60, '61, '62, '63 NBC Broadcasting would be used for maybe just a certain amount of dollars once a month.

The Court: Used for what purpose?

The Witness: Well, let me say this, your Honor, that—

The Court: Was it used to hide differences in (1158a) other accounts; is that what you mean?

The Witness: Yes. Well, the reason why this one was a little bit different is that it was what they call in banking circles a complimentary balance. They just left that with us in order for certain services that we perform for them and the balance was always to be $10,000.00. It was pretty easy to trace that one out. And then at one other point, specifically in—on a temporary basis—August '65, it was used. I don't know whether that was a week that was used, or what, but it was August '65.

* * *

(commencing at 1158a-24)

Q. Now, Mr. Metzheiser, when did you and the other bank officials know that Peat, Marwick, Mitchell & Company (1159a) was replacing Burt & Company as the bank's outside auditors?

Mr. Klaessig: Your Honor, I object, unless there is a foundation laid. How would he know that other bank officials in addition to himself—

Mr. Horowitz: I will withdraw that.

The Court: Reframe it.

Q. If you know, do you know when Mr. Paxton became aware that Peat, Marwick, Mitchell & Company was to replace E. R. Burt & Company as the bank's outside auditors? A. When Mr. Paxton knew?

Q. Yes. A. That would have been around the period April through June of 1965. One of those months. April through June, probably April or May.

The Court: You say that Paxton knew during that period that Peat, Marwick, Mitchell & Company was going to replace the then bank auditors?

The Witness: He would have known that we had new auditors, but not the date that they would be coming.

The Court: Did he know the identity of the new auditors?

The Witness: The firm's name?

The Court: Yes.

The Witness: Yes, your Honor.

* * *

(1160a) *Cross examination by Mr. Klaessig*:

* * *

(1163a) Q. And did you put in your affidavit that you found three checks in the drawer of Mr. Paxton? A. Three unposted checks.

Q. Yes, three unposted checks. A. Right.

Q. And anywhere in your affidavit do you mention any other check? A. I think the affidavit referred only to unposted checks. Those four checks—three were unposted and one was posted. I believe that for the purposes of that affidavit I was being asked about unposted checks. I found four checks. Three were determined to be unposted and one we subsequently determined to have been actually paid by the bank.

Q. Mr. Redfield, when you found checks in that metal cabinet, you couldn't tell whether they were posted or unposted, you couldn't tell whether they were paid or unpaid until you made an investigation, regardless of how they were stamped, isn't that so? A. Yes, but the affidavit came much after the investigation. The affidavit says three unposted checks.

Appendix C

Q. You couldn't tell—to this very date, can you tell whether any given check in evidence—G-1 to G-113—was actually posted or not posted, charged or not charged against the account? A. Yes, we can. We checked it. Peat, Marwick, Mitchell & (1164a) Company checked that report. The bonding company sent in a C.P.A. firm and they checked the report.

Q. When Peat, Marwick, Mitchell & Company makes an investigation, it submits a written report, doesn't it? A. Yes, sir.

Q. And every responsible auditor making investigations submits a written report, doesn't he?

Mr. Horowitz: I object.

The Court: Sustained.

A. Not necessarily—

The Court: Wait a minute. I sustained the objection.

Q. Let me see your working papers.

(Papers handed to counsel by the witness.)

Q. Are these yours? A. Yes, sir; that's my handwriting.

Q. Does any of this belong to Mr. Redfield? A. I would have to look at each one individually. Offhand I would have to say no, because I think I did this part of it myself. Mr. Redfield may have assisted me. But the summary recaps there are all in my handwriting.

Q. The summary recaps are some notes here, is that right? A. Well, there are two. There is the front sheet, which has figures, and then there is an explanation of my figures.

Appendix C

(1165a) Q. And that is your explanation consisting of about six paragraphs of your figures? A. That's my name signed on the bottom; yes, sir.

Q. And this is after months of investigation, you have in writing, aside from numbers, you have only in writing six paragraphs reviewing, summing up your investigation? A. No, no.

Q. Show me something else that is in the written form here. A. That is not true. This is a particular report covering a certain period of time. This is only one part of it.

Q. Oh, this is only one part of your total investigation. Where are your other work papers? A. I have some; Peat-Marwick has some.

Q. You were asked to bring all your work papers in, weren't you, you and Mr. Redfield? A. I was—

Mr. Horowitz: Wait a minute. I object.
The Court: Has the question been completed?
Mr. Klaessig: Yes, your Honor.
The Court: Let me hear the question.

(Question read.)

Mr. Horowitz: I object. No. 1, the question is argumentative. No. 2, the question ought to contain who asked him and for what.

* * *

(commencing at 1167a-22)

The Court: If you can locate the question, go ahead and read it.

(Question read as follows: "Have you ever started your investigation with the assumption that Colortone (1168a) and Starbrite are innocent and others are guilty?")

Appendix C

A. In the beginning, what I was going to say—

The Court: No, no, no.

Mr. Klaessig: The question was answered.

The Court: I want to know whether or not any answer was made to that question.

(Record read.)

The Court: That is the end of the answer. And then the Court said it didn't want to hear anything about philosophy, it was up to the lawyers to ask proper questions, and for the witness to answer to the best of his ability. All right.

The Witness: I didn't mean that to be the answer to my last question.

Q. You didn't mean that to be the answer? A. I was—

The Court: Gentlemen.

Mr. Klaessig: There is no question, your Honor.

The Witness: I was saying no—

The Court: Please, gentlemen.

The Witness: I am sorry, your Honor.

The Court: So far as the record shows, the witness has completed his answer. And then he asked the Court whether or not he could explain the philosophy behind it. And the Court said no, because the Court prefers that (1169a) counsel ask questions, and the witness answers to the best of his ability. If anything remains for further questioning, then, of course, Mr. Horowitz has the opportunity to go over any ground that might be left in an uncertain state.

That is the way the record stands now.

* * *

Appendix C

(commencing at 1170a-3)

Q. Then why were you hemming and hawing when you were questioned about how many days does it take to process from Rochester, when you knew all the time on August 9th it had been in the bank and returned? A. I don't remember being asked about the number of days. I don't think it was me that was asked that.

Q. Do you recall the name of that account—has a $295,000.00 balance in evidence here? A. $295,000.00?

Q. Yes, Phoenix something Industries. A. I heard that one mentioned the other day.

Q. Do you recall all the ledger sheets that were found in Mr. Paxton's cabinet? A. Well, most of them I do, yes.

Q. Do you recall whether there was one, Phoenix Industries, with a balance of $295,000.00? A. It depends on what envelope it is in.

Q. Well, you investigated every ledger that you found in the metal cabinet. A. I didn't say it was found in the metal cabinet.

Q. In the bank. A. Well, in the bank, that's something different.

Q. Which was tainted in some way by Paxton. (1171a) A. The whole bank?

Q. No, the ledgers you found. A. Well, there were lots of ledgers that snould be in the bank. That would be normal bank records.

Q. No, I mean these ledges were the ledgers that were either in the metal cabinet, and were suspect because they were in the metal cabinet, or were somewhere else in the bank and were suspect because of a peculiar contact Paxton might have had with them isn't that so? A. Not because Mr. Paxton may have had contact. I believe the envelopes specifically have names on them.

Appendix C

Q. And are those names in your handwriting, showing you D-15? A. Yes, that's right. I would recognize it.

Q. National Phoenix Industries. A. Right.

Q. How much of an investigation did you do on National Phoenix Industries? A. That was— Could I see the file—that envelope, please?

Q. Yes.

(Handed to the witness.)

A. This was the group—this was the envelope, when we had the recess that day, that we discussed that I was not sure of where the statements in this envelope were found. That was the reason why I didn't attempt to identify them (1172a) on the face of the envelope. When the investigation began, we had lots of people going around looking for statements and stuff. If they brought me these, sometimes they meant something, sometimes they didn't. To my knowledge, National Phoenix doesn't ring any kind of bells. There are other ones in here— Do you want me to go through the whole envelope, Mr. Klaessig?

Q. Have you answered my question, to the best of your ability? A. As to whether National Phoenix was what? I can't really remember what National Phoenix—what happened to it.

Q. Because you have conditioned your mind systematically to feel that Starbrite is guilty, in terms of benefiting from the operations of Mr. Paxton, isn't that so? A. I wouldn't say that. I wouldn't say that at all.

Q. Have you found anything in favor of the account of Starbrite or Colorton, have you ever found anything in favor of them? A. Well, we found a couple of checks.

Q. You mean over a hundred checks, after the defense produced them? A. No.

Q. Paid checks. A. I was going to say, Mr. Klaessig, that we did find two checks that we did not put in the claim, even though they (1173a) weren't stamped paid, because our investigation determined them to be paid. And if we had just assumed that everything we found was unpaid, we just would have thrown it in without any investigation. But we actually had two checks that, although on the surface they appeared to be the same as every other check, our investigation showed them to have been bona fide items and we didn't put them in.

The Court: To have actually been paid.
The Witness: Yes, your Honor.

A. (Continuing) I don't think we went about it with the idea in mind that, you know, we were trying to hit them with everything, or anything like that.

Q. You ready testified, didn't you, that you were influenced by the fact that Paxton said that it was Starbrite and Hecht. A. Well, the first day that this thing broke, Mr. Paxton wasn't permitted to say anything by the bank's attorney. He was advised to get counsel. After Mr. Paxton got counsel, he called us in and Mr. Paxton said he could—he asked his counsel, "What can I say?" And they conferred for a while. And then Mr. Paxton came back and said he can remember Morreale Brothers, Starbrite, Colortone, Milton Hecht. And those were the only names that he furnished us that first day.

I have to say that we would have been foolish to (1174a) ignore what Mr. Paxton told us. But we also would have been foolish to take everything that he told us and just stop there, or else we wouldn't have sent out the confirmations we did.

Q. Were you taking notes when Mr. Paxton was telling you these things? A. I believe I did.

Q. Where are those notes, to refresh your memory, as to what he actually said to you? A. They could be in one of these envelopes or they could be in the bank. I think I still have them, though.

Q. And now I ask you: Was National Phoenix Industries—and I refer to one particular sheet here, showing a balance of $257,198.15—was it found in the metal cabinet of Paxton, adjacent to his office? A. I would have to say no, because I never remembered this account until we saw it in court the other day and you and I discussed it.

Q. And H. Reischman, was that found in the cabinet of Mr. Paxton? A. I just can't say. That one I don't remember. There were a couple that I couldn't remember. That's why they were in that envelope.

Q. Did you investigate the Phoneix and the Reischman accounts? (1175a) A. Offhand I'd—to the best of my recollection, I'd say no; but we could have.

* * *

Appendix C

(1191a) UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Cr. #20-66

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON HECHT,

Defendant.

Newark, N. J.
Thursday, 10:00 a.m.
May 25, 1967

(The parties met pursuant to adjournment.)

(Appearances as heretofore noted.)

(Whereupon the following proceedings were had outside the hearing and presence of the jury:)

The Court: All right. I understand now that both sides have rested, subject to the marking of a few additional exhibits in evidence on the government's case, and also the further testimony of one additional character witness on behalf of the defendant. Is that correct, gentlemen?

Mr. Klaessig: Yes, your Honor.

Mr. Horowitz: That is correct, your Honor.

The Court: And you are now ready to argue to the Court?

Mr. Horowitz: Yes, sir.

The Court: I will hear Mr. Klaessig.

Mr. Klaessig: May it please your Honor, I am (1192a) moving at this time in a consolidated motion for the convenience of the Court, for judgment of acquittal and consolidating with it, sir, preliminarily, certain motions to strike testimony.

I move, your Honor, to strike the entire testimony of Mr. Metzheiser in reference to anything that he did not personally see.

We have a situation, your Honor, where there is an investigation of the bank. It isn't the F.B.I. conducting the investigation, it is not any CPA accounting firm in this court testifying to its investigation, it is a man who is introduced to the Court as not an expert. And I refer your Honor—

The Court: You don't have to. I know that.

Mr. Klaessig: As not an expert. One of the most fundamental principles, considering the vitality of the Sixth Amendment, is that every defendant must be confronted with the witnesses against him. And that principle embraces, your Honor, the implication that it must not be based on hearsay, because if it is hearsay incriminating the defendant, he has no opportunity to cross examine on that hearsay.

And if there is "best evidence," that is, superior evidence, documentary evidence, legitimate bank records, he has a right to be confronted with the witness, the (1193a) best witness, against him. And I submit that where you have a bank, you have a

minor functionary of that bank—and that is all Mr. Metzheiser was, a minor functionary, he is not the president, he is not a qualified man, he is only working there seven months—and he is permitted to reach certain conclusions, based on a staff that he supervised, based on a staff he supervised as not an expert, based on a limited investigation, limited by his own testimony—he didn't do this, he didn't do that—and I submit, your Honor, that, at best, the value of his testimony—assuming its competency, to incriminate a man who has these Sixth Amendment rights, assuming its competency—at best it is insufficient to incriminate the defendant, because it has not covered all the logical territory a competent investigation would have to cover.

In other words, your Honor, to put on a simple level, suppose the issue were: Is the world round or flat? And Mr. Metzheiser testified: I traveled six thousand miles and I found the world flat the entire distance. I submit that—it is true that it would take a lot of complicated argument to prove that that is not a sufficient basis for reaching the conclusion that the earth is flat. But we are now in a situation where we say that proving six thousand miles does not (1194a) prove it, because the only thing that can prove it is going twenty-four thousand miles, or doing this, or doing that, or whatever is the criteria or proof of the proposition.

The Court: My school day recollection is that the world's circumference was twenty-five thousand miles. So you and I differe a thousand, but it doesn't make too much difference.

Mr. Klaessig: Thank you, your Honor.

Appendix C

But basically the witness comes in with sufficient evidence and says: On the basis of what I did—I am not going to define for you gentlemen of the jury what I did, or for the Court. I am just telling you I did so-and-so. And on that basis I have reached a conclusion that there was no charge against the Hecht accounts, or the Colortone, or the corporate accounts, on the basis of my limited investigation. And I want you to accept that conclusion.

I say to your Honor, no, that on its face is based on insufficient data and must be rejected by the Court.

I am not objecting to where he says, "I went downstairs and I did this or that, and I personally was present." On matters he knows nothing of, that is, supervisory personnel— And, by the way, a highly (1195a) prejudiced staff, your Honor. On the face of it already, these are people in the bank who, in the light of the entire testimony, are possible suspects in what really went on in the bank. They are employees of the bank, in the service of the bank as employees, to hide whatever may have really gone on in the bank.

The witness himself testifies that there could have been hundreds of these deposits. There could have. And he didn't make adequate investigation. And there could be a half a million dollars missing.

But even let's analyze—assuming he is an expert, assume his testimony—that he has a right to reach conclusions. Let's analyze some of the conclusions.

The witness is shown a series of 113 checks.

And he says, "I investigated"—and I am sure I don't have to refer your Honor to the page—"I investigated and I found all 113 checks were not charged against the account of Milton Hecht, or his corporation, and therefore I concluded that the bank suffered a loss, because they were not charged."

And initially, your Honor will recall, that I thought that the United States Attorney was going to prove a negative. And I am sure your Honor and I both understood an absolute negative. Not a negative in stages, as actually the witness admits that he only proved a partial negative. He did not exhaust the negative by going all the way down to reach the absolute result.

He said—in my cross examination I developed it—he looked at certain checks and because he could find no bank statements in reference to those checks, then he concluded there had been no charge.

Now, this is highly significant, your Honor. There are bank records destroyed. And there was no follow-up to determine whether or not—what fills in this vacuum. How can he conclude that the bank lost money when he cannot find the records, on further examination, on checks where he said he found a photostatic copy of the monthly bank statement and it was not charged on there.

He declared that he limited his investigation to two or three days in some instances, two or three weeks in some instances. But I asked him, "Wasn't it conceivable, in view of all the operations, the magnitude of these operations, that there could have been, as in other accounts, a return of money, that there wasn't a charge on one month, couldn't

it have been charged three months later, or two months later? Did you exhaust that possibility, even where you found the bank statement?"

* * *

(commencing at 1205a-24)

The Court: May I interrupt you there? I appreciate all of this argument and I am not going to (1206a) cut you short. But it seems to me that what we are talking about is the weight of the evidence and the credence that is going to be given to such evidence by the jury. I think we come right down to that, Mr. Klaessig.

If you have other points in your argument, as I said before, I will give you all the time you need. But when you talk about the situation relating to Metzheiser's examination, the jury can only evaluate that in the light of what you brought out.

Mr. Klaessig: I appreciate your Honor's reaction.

The Court: And when you come to Mr. Paxton, the jury will evaluate that in the light of his own confessed activity and what you brought out in relation to other accounts, you see.

Mr. Klaessig: I appreciate that, your Honor. May I just make a formal statement, for the record?

The Court: Surely.

Mr. Klaessig: If your Honor please, I now move for judgment of acquittal on the ground that, as a matter of law, the evidence is insufficient for the jury to consider as evidence from which a conviction beyond a reasonable doubt can be drawn, that

the evidence is incompetent in all respects, whether it is paper, documents, or oral testimony, that it is (1207a) incompetent, as a matter of law, for reasons I have elaborated upon at this motion. And I hereby incorporate for the record all arguments I enunciated in my previous motion for a directed verdict.

The Court: Very well. The motion will be denied.

* * *

APPENDIX D

Affidavit of Milton Hecht

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } ss.:

MILTON HECHT, of full age, being duly sworn according to law, upon his oath, deposes and says that:

1. I am the defendant in the matter of United States v. Milton Hecht which was tried before Judge Anthony T. Augelli between May 1, 1967 and May 26, 1967.

2. I was present at all times during the trial and remained in the corridor outside of the courtroom during all recesses. I had ample opportunity to observe all persons attending the trial while they were in the courtroom and while they waited in the corridor during recesses.

3. I noticed that during the course of the entire trial several older men attended as spectators and mingled in the corridor during recesses. I noticed that one of these men, who was bald-headed and had a dark complexion, was present every day and usually sat the last row. He was in attendance in court each day when the court convened and left after the court had recessed for the day. During recesses, he would either sit on one of the benches in the corridor or stand near the courtroom door, conversing with various persons attending the trial. I noticed that he was observing my movements and discussions with my witnesses and my attorneys.

4. This man was present in the courtroom at all times when the jury was excused and heard all the motions and discussions between the attorneys for the prosecution and

the defendant and the Judge. He heard the motions for acquittal made at the end of the Government's case and at the end of the trial.

5. During the course of the entire trial, I noticed this man discussing the trial in the corridor during recesses with several other spectators. On several occasions, I saw him speaking in the corridor with an attorney who was a spectator during the entire trial in behalf of Edward R. Burt & Company, the former accountants for Citizens National Bank.

6. On several occasions, I saw this man conversing in the corridor during recesses with Gerald F. Metzheiser and Herbert L. Redfield, witnesses for the prosecution who attended the entire trial. I also saw him speaking in the corridor with Donald Horowitz, the Assistant U. S. Attorney.

7. This man remained in the corridor during the entire period that the jury was deliberating and at various times, I saw him speaking to Mr. Metzheiser, Mr. Redfield and Mr. Horowitz.

8. On Friday, May 26, 1967, after the jury had rendered its verdict, I left the courtroom and met my brother Marvin Hecht, who attended the trial. My brother advised me that shortly after the verdict was announced, he had left the courtroom and was walking down the corridor toward the elevator. He told me that he saw juror No. 7, who, I informed, is Estelle Crismale, meet this man at the elevator, that both greeted each other and left together in the elevator. I brought this incident to the attention of my attorneys the same day.

/s/ MILTON HECHT

(Sworn to June 1, 1967.)

APPENDIX E

Hearing on Investigation of Juror No. 7

(1348a) UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Crim. No. 20-66

UNITED STATES OF AMERICA,

v.

MILTON HECHT,

Defendant.

Newark, New Jersey,
November 13, 1967.

Before:

The Honorable ANTHONY T. AUGELLI,
U.S.D.J.

Appearances:

DONALD HOROWITZ,
Assistant U. S. Attorney.

FREDERICK KLAESSIG and
LEONARD STONE,
Attorneys for the defendant.

(1349a) The Court: Is Mrs. Crismale here?

Mrs. Crismale: Yes, sir.

The Court: And that gentleman is your husband?

Mrs. Crismale: Yes, sir.

The Court: What is your name, please?

Mr. Crismale: Vito Crismale.

The Court: Will counsel step up a minute?

(Discussion at sidebar, off the record.)

The Court: Mr. Crismale, I am going to ask you to please leave the courtroom and wait outside. I will call you back.

(Mr. Crismale leaves the courtroom.)

The Court: This is a rather unusual situation, Mrs. Crismale, but there is nothing to be nervous about.

Mrs. Crismale, will you please step up? I am going to ask you to be sworn.

ESTELLE CRISMALE, sworn.

The Clerk: Will you state your full name, please?

The Witness: Estelle Crismale.

The Court: There is no need to be nervous. All you do is answer a few questions, Mrs. Crismale, and that is all there is to it. This hearing is being conducted pursuant to a motion made by counsel (1350a) for the defendant, Milton Hecht, and the purpose of my asking some questions is to ascertain whether or not things happened, that's all. Do you understand?

The Witness: Yes.

The Court: All right.

Appendix E

Examination by the Court:

Q. Now, you were Juror No. 7, if you recall, when this case was tried; do you remember that? A. That's right.

Q. And I think that the jury returned a verdict on May 26th, 1967.

I think that is the date. Am I correct in that, gentlemen?

Mr. Herowitz: Yes, sir.

Q. And on the one count of the indictment in which Mr. Hecht was involved—that's Milton Hecht—the jury returned a verdict of guilty; do you remember that? A. That's right.

Q. Did your husband attend the trial while it was going on? A. Yes, he drove me out every day and drove me home at night.

Q. Speak up so that the reporter hears you, please. A. He had a heart attack eleven months before, and I wouldn't leave him home alone.

(1351a) Q. All right. So he drove you to the courthouse and at the end of each day's session did he drive you home? A. Yes.

Q. All right. And his name is Vito? A. That's right.

Q. You recall, Mrs. Crismale, that during the course of the trial you and other members of the jury were excused from the courtroom from time to time so that the Court could hear certain legal arguments that were made in this case; do you remember that? A. Yes.

Q. You were excused from time to time? A. Yes.

Q. And you were told when you were excused that you were excused for the purpose of enabling me to hear legal arguments and that those legal arguments had nothing to do with your function as a juror; do you recall that? A. That's right.

Q. Tell me, please, did you at any time while the trial was in progress discuss the case with your husband? A. No. All that I discussed with him was—I'd tell him which juror was which, and if she lived in Linden, or Rutherford. We were talking about personal things, what the girls did in the jury room, things like that.

Q. I see. Now, did your husband at any time while the trial was in progress discuss the case with you? (A1352a) A. No, he didn't have to. He heard as much as I did. In fact, he said there was some man in the courtroom, I don't know whether he was a reporter or who, but he met my husband outside when we were in the jury room, and he said, "What does your wife think about the case?" He said, "I don't talk it over with my wife."

He said, "Things like this we don't discuss. She is a Protestant, I am a Catholic. She is a Republican, I am a Democrat."

He said, "We get along. We don't have to talk about things like that. That would make arguments, if we did."

Q. All right. Did your husband at any time tell you what happened in this courtroom during the jury's absence? A. No, I don't think he stayed in here. He said he went to other courtrooms.

Q. All right. But answer that question. Did he at any time tell you what transpired here in this courtroom when you and the other jurors were absent? A. No.

Q. All right. Did he at any time tell you about any conversations he may have had with others in the corridor of this courthouse while this trial was going on? A. Yes. As I told you before, I don't know who the man was, maybe a reporter or something, and he said, "How does it look? How is it going?" He said, "Does your wife talk (1353a) it over with you?" And he said, "No."

Appendix E

Q. Did he ever tell you about any conversations he may have overheard in the corridor relating to the defendant, Mr. Hecht? A. No. I don't think he heard any.

Mr. Klaessig: I didn't hear that.

The Court: I don't think he heard any.

The Witness: I don't think he heard any conversations.

Q. Did you at any time, Mrs. Crismale, while the case was going on, communicate to any other members of the jury anything that you may have seen, or heard, or were told outside of this courtroom? A. No, none of us did.

Q. Are you telling me then that even though your husband may have been in this courtroom every day of the trial—assuming that— A. Yes.

Q. —and even though he drove you here every morning and waited for you every night— A. Yes.

Q. —after court was in recess, that he at no time spoke to you about the case, or what he may have heard others say about the case? A. No, he just kept complaining "When is this going to (1354a) end?"

Q. All right. And did you at any time while the case was in progress discuss what was going on in the jury room with your husband? A. No.

The Court: Step up, please, gentlemen.

(Discussion at the bench, off the record.)

Q. Mrs. Crismale, did you or your husband ever eat lunch together with all the other jurors? A. Yes. I don't know whether it was one or two days. We went to the Chinese restaurant.

Q. Chinese restaurant. Here, locally? A. Yes.

Q. You and your husband went there during lunch hour? A. Yes.

Q. And other members of the jury were present? A. Yes, there was three other ladies.

Q. Three other ladies. And during that lunch hour was the case discussed? A. No.

Q. Not at all? A. Not at all.

Q. All right. A. One other day we went across the street with Ann.

Q. Pardon me? (1355a) A. One other day we went across the street with Ann. I don't remember her last name.

Q. When you say Ann, was she a member of the jury? A. Yes.

Q. When you say "we" went over there, who? A. My husband and I.

Q. I see. For lunch? A. Yes.

Q. Was the case discussed at all? A. No.

Q. Not at all? A. It was crowded. You couldn't discuss it.

Q. Did your husband ever tell you that he did not discuss the case with any other witness, or other witnesses in this case? A. He didn't tell me that, but I was with him when—I mean he couldn't have been with another witness without me.

Q. You say he could not have been with another witness without you, is that right? A. That's right.

Q. Well, isn't it possible that he could have been without you knowing it? A. How?

Q. Well, I don't know. I am asking you. A. He brought me in the morning. I went to the waiting (1356a) room. And he stayed outside until the court started. At lunch we went together. Twice we went with girls—one day with Ann and the other day with three girls. And when it was over, he was outside waiting for me. Maybe he said good morning to one as he came in late. Then I wouldn't say.

The Court: All right.

(Discussion at the bench, off the record.)

Q. Mrs. Crismale, did you at any time discuss this case with your husband in the corridor of this courthouse? A. No.

The Court: All right. Mr. Horowitz, do you have anything further?

Mr. Horowitz: I have no questions.

The Court: Any more, Mr. Klaessig?

Mr. Klaessig: No, your Honor.

The Court: All right.

Mr. Horowitz: Just one thing more.

(Discussion at the bench, off the record.)

The Court: Mrs. Crismale, you will be excused now and I will ask Mr. Crismale to come in.

The Witness: I can go outside?

The Court: Yes. Thank you very much.

(Witness leaves the stand.)

(1357a) The Court: Mrs. Crismale, one more question, please. You don't have to take the stand. Come up here a minute, please.

(Witness returns.)

Q. In other words, are you telling the Court—and I want to know, I want a full and complete answer—that you obeyed the Court's admonition that was given to you time and time again throughout the trial that you did not discuss this case with others? A. That's right.

Q. And that you did not permit others to discuss it with you? A. That's right. I said we were told we weren't allowed to discuss the case. I even told that to my husband the first day.

Q. All right. And you didn't discuss it among yourselves while the case was going on? A. No.

The Court: All right.

(Witness excused.)

VITO CRISMALE, sworn.

Examination by the Court:

Q. Mr. Crismale, you remember the case in which your wife sat on the jury that was in this courtroom? (1358a) A. Yes, I remember the case. Come into the court: That's all.

Q. All right. Were you here every day while the case was going on? A. I couldn't swear I was every day. I was every day in the court, not in this courtroom.

Q. All right. Did you drive your wife to the court every day? A. That's right.

Q. And then you drove her home, is that right? A. That's right.

Q. Were you in this courtroom, and if you were, do you remember that I would excuse the jury from time to time? A. Yes.

Q. Do you recall that? A. Yes, sir.

Q. I would excuse the jury and then I would hear argument by the lawyers, do you recall that? A. Well, I don't pay much attention, but—

Q. But you heard the lawyers argue with the Court? A. That's right.

Q. Or talk to the Court— A. That's right.

Q. —when your wife and the other jurors were not in the courtroom, you heard those? A. Sometime I did, sometime not.

(1359a) Q. All right. Did you hear the argument that was made where Mr. Klaessig, who represented Mr.

Hecht, argued to the Court and said, "My man is not guilty" or "He should be acquitted." Did you hear that kind of talk? A. Well, I tell you the God's honest truth, I don't pay much attention, because, after all, I had nothing to do with the—

Q. All right. Now, did you ever tell your wife of anything that you heard in this courtroom when your wife and the other members of the jury were not present? A. No, sir.

Q. It has been reported to me, Mr. Crismale, that during court recesses, when the Court would take a recess every once in a while, that you would talk to people out in the corridor; is that so? A. No. One guy approached me. I don't know his name. I never saw him before. And he asked me what the jury is doing. And I told him I had nothing to do with it, I don't know what my wife is doing, I said, because she is Republican, I am a Democrat. And I said she is a Protestant and I am a Catholic. So the guy said, "How the hell you getting together?" I said, "We get along fine. What's that got to do with it?"

Q. All right. Do you remember talking to any witness out in the corridor, anyone who was a witness (1360a) in the case? A. No.

Q. Do you remember talking to Mr. Metzheiser, if you know who that man is? A. I don't even know him.

Q. Or a Mr. Redfield? A. No. No, I don't know none of the people, except—your face, and this face, and this gentleman's face.

Q. What about that face right there? A. Yes, I remember.

Q. —the assistant prosecutor, Mr. Horowitz? A. Yes, I remember. Some day I was sitting there in the court.

Q. Did you talk about the case with him? A. No, I had nothing to do with it. What I got to do with it?

Q. All right. Did he talk about the case with you? A. No, no.

Appendix E

Q. Now I am going to ask you once again, and you give me your best recollection. Did you at any time, Mr. Crismale, while this trial was going on tell your wife what you heard here in this courtroom— A. No.

Q. —when the jury was not present? A. No, I got nothing to do with it, outside—I mean (1361a) I had nothing to do with the case and I won't interfere. Why I want—

Q. All right. Answer this question. Did you at any time, while this trial was in progress, relate to your wife, or tell your wife, anything you may have heard about the case as a result of your talk with others, or any other thing that you may have heard out in the corridor of this courtroom? A. No, your Honor.

The Court: All right. Gentlemen, step up.

(Discussion at the bench, off the record.)

Q. Mr. Crismale, did you talk to Mr. Horowitz at all while this case was going on, this gentleman here, the assistant United States Attorney? A. No.

Q. Did you have lunch with your wife while this case was going on? A. That's right.

Q. Just with your wife or with others? A. With my wife alone.

Q. Do you remember how many times you had lunch with your wife? A. Every day while the Court was going on.

Q. And do you know what restaurant you went to? A. I went to this—

(1362a) Q. One nearby here? A. Yes.

Q. Did anyone else have lunch with you, any members of the jury? A. Not that I remember.

Q. You don't remember that? A. No.

The Court: All right. That is all, gentlemen. Unless you want the Court to put further questions to this witness, he will be excused.

Mr. Klaessig: Just one moment, your Honor.

The Court: Yes.

(Counsel confer.)

Q. Mr. Crismale, you said you would drive your wife home every night, is that right? A. That's right.

Q. Did you ride any other juror home, did you take any other juror home? A. No.

The Court: All right. If there are no more questions, gentlemen, I will excuse Mr. Crismale.

Satisfactory, Mr. Horowitz?

Mr. Horowitz: Yes, your Honor.

The Court: Mr. Klaessig?

Mr. Klaessig: Yes, your Honor.

(1363a) The Court: You are excused. Thank you very much.

(Witness excused.)

Mr. Horowitz: Would your Honor wish Mr. Crismale to stay in the courtroom?

The Court: No, I would prefer not.

Do you want to wait outside with your wife, Mr. Crismale?

(Mr. Crismale leaves the courtroom.)

The Court: As a matter of fact, they are both free to leave. You might tell them.

Have them both come in. Have them both step inside.

(Mr. and Mrs. Crismale enter the courtroom.)

The Court: Mr. and Mrs. Crismale, I am going to excuse you now. Both of you are excused. You may go home. And you don't discuss this matter. It is nobody's business why you were called, or anything else. Both of you are now excused.

(Mr. and Mrs. Crismale leave the courtroom.)

The Court: All right, Mr. Klaessig.

Mr. Klaessig: May it please your Honor, I submit respectfully that the evidence has laid a base for a more elaborate hearing on the issue of whether or not this defendant has been deprived of (1364a) his Constitutional right to an impartial jury—impartial jurors.

The Court: What do you base that on?

Mr. Klaessig: I base it on, your Honor, three contradictions in the testimony of the husband. First of all, I say his testimony is not credible when he testifies that he never had lunch with any other jurors besides his wife.

The Court: To the best of his recollection.

Mr. Klaessig: Well, he never spoke to Mr. Horowitz. And if he adds to that the best of his recollection, I submit that is incredible, because—and we have witnesses—that is why I asked for a more extended hearing—we have witnesses who will testify to these conversations, not only with Mr. Horowithz, but with Mr. Metzheiser and with Mr. Redfield, and that they were of extensive nature in the the corridor, and that it was colloguy back and forth between the husband and the wife.

Now, that brings us to the issue—assuming that were true, assuming that we establish that, we still would have to establish that it was communicated to the wife and that she was influenced by that.

Appendix E

First of all, we are in a situation where we cannot compel this wife to testify against her (1365a) husband. We cannot compel her to make out a case against her husband, that he did, in fact, tell her of his conversations in the corridor.

We can't compel the husband to testify against the wife. We cannot even assume that the wife's testimony is truthful, in terms of the limited conversation between her and her husband, because she may be protecting her husband from what he actually said.

I submit on the basis of the husband's complete denial of any conversations between himself and the U. S. Attorneys, and his complete denial of conversation with the government's witness, and the wife's protective testimony, that he could not have spoken to a witness, or this or that, because he was within her surveillance, so to speak, the implication that she knew what he was doing. I say that is protective and suspicious.

I submit that this husband, in all probability, at a full hearing, where counsel could—which is no criticism of your Honor's questions, because I am satisfied at this stage, but I think a full hearing will bring out that there was substantial colloquy between the husband and wife. At least we have laid sufficient basis in the rules to make this very (1366a) important issue of whether or not that juror was influenced at least something that should be inquired into more fully. I submit we have established a case.

The Court: And what would you have the Court do now?

Mr. Klaessig: I would have the Court hold a full hearing.

Appendix E

The Court: With?

Mr. Klaessig: With all the witness we want to show—Mr. Metzheiser, Mr. Redfield, Mr. Horowitz himself, although we could readily accept Mr. Horowitz' statement in his brief where he concedes he did have a conversation, we could accept that, we wouldn't necessarily have to call Mr. Horowitz—to show that this witness, the husband, is not telling the truth. And that I then have the opportunity to cross-examine him, after we confront him with the contradictions of other witnesses. And then we could develop possibly—at least we should have a fair chance at developing material whether the husband did, in fact, after we have demolished his denial of all these conversations, whether then we could get testimony from him whether he did, in fact, communicate with his wife concerning the case.

(1367a) Mr. Horowitz: If the Court please, I, of course, would object to any such procedure. Even assuming that you could produce Mr. Metzheiser and Mr. Redfield, or anybody else, and assuming that they might remember at this late date—and it is now November 13th, 1967, and this trial took place last spring, and ended, I believe, May 26th, as your Honor might have said—there is no reason to doubt Mr. Crismale's veracity simply because he doesn't know whom he discussed—if he did discuss—anything with out in that hall. There were a lot of people roaming out in that hallway and he could have been talking to anybody on occasion and not know whom he was talking to, or even met one of the witnesses out there, and there is no reason to believe that he was discussing the case with them.

As far as his conversations with me—and I am

frank to admit I believe that was the man I had one conversation with while the jury was out—however, my recollection, of course, at the time it happened, and Mr. Klaessig served his motion papers on me, I distinctly remember having a conversation with an individual, which I, of course, disclosed in my brief. But that is no reason to believe that just because Mr. Crismale, who, I understand—and I don't know this as a fact, but I understand that Mr. (1368a) and Mrs. Crismale were only served with your Honor's subpoena this morning or this afternoon—

The Court: I don't know when they were served.

Mr. Horowitz: Neither do I, as a matter of fact, but I—

The Court: The reason I didn't want to serve them too early was that I didn't want to give them too much time to worry what it was all about. I wanted to get them in here fresh so I could ask them some questions.

Mr. Horowitz: Of course, this would be a matter of court record and—

The Court: The Marshal's office.

Mr. Horowitz: The Marshal's records. But I have reason to believe that those subpoenas were not served prior to today. And the reason I have that information—I will disclose quite freely—is that one of the Marshals called me early today and said that he had these subpoenas to be served, and they were very shorthanded up there and did they have to be served? And I said, "For God's sake, that's the Court's subpoenas, not our office subpoenas. The hearing is at 4:00 o'clock. And you better serve them." So that is my reason for believing (1368a) that Mr. and Mrs. Crismale had no

notice prior to whatever time today they were served that this hearing was to take place, they have not been approached by anybody from my office, or any other law enforcement agency of the government, as far as I know. So there is no reason to believe that they knew anything about this from the government's side. And I trust—Mr. Klaessig is an honorable gentleman—I have no reason to believe that he had approached—

The Court: I am satisfied that both of you made no approach.

Mr. Horowitz: That's right.

The Court: Otherwise you both might be in some trouble.

Mr. Horowitz: Well, of course, as Mr. Stone said, if they had approached these witnesses they would have done a better job.

The Court: I rely entirely on the integrity of counsel.

Mr. Horowitz: The point I am making is that it is not suspicious that Mr. Crismale today has absolutely no recollection of talking to me for maybe three to four seconds one afternoon, on May 26th, which is almost half a year ago. There is no reason, in view of Mrs. Crismale's complete denial (1370a) of ever having discussed the case with her husband, and Mr. Crismale's corroboration of never having discussed the case with his wife, it seems to me that the purposes of this hearing have sufficed and that any other investigation or interrogation would be to simply no avail, and would invade the privacy and the sanctity of the jury system for no purpose.

The Court: Well, what I was primarily concerned about, of course, was to satisfy myself on one thing,

among others, but principally if this husband was in this courtroom and heard legal argument, and heard this Court deny motions, or grant them, I wanted to make very certain that none of that information was conveyed by the husband to his wife. Because whatever transpired in this courtroom in the absence of the jury was done purposely so that the jury would give it no consideration. And they were so told, that whatever transpired here was none of their business, in so many words.

Mr. Horowitz: That is correct. I just want to point out one further fact which comes to mind. Mr. Klaessig makes a point of the fact that Mr. Crismale could not remember having lunch on one or two occasions with other members of the jury. It (1371a) should be considered that Mrs. Crismale was the one who was under oath as a juror. Mrs. Crismale was the one who received your Honor's admonition and was mindful of your admonition. So it would be Mrs. Crismale who would have been careful to remember on the occasions when her husband did accompany her, and the other girl or girls on the jury, not to permit any discussion at that time. And it is far more reasonable to believe that she would have a sharper and more precise recollection of those luncheons than he would. He, as he indicated here, paid no real attention. He had had a heart attack eleven months before the trial, I believe it was said. He was therefore not employed. He was doing nothing but driving his wife back and forth, sitting in this courtroom on occasions, and sitting in the other courtrooms on occasion, and had no reason to pay attention to what was going on in this courtroom.

He was apparently so uninterested in what was going on in this courtroom that he would go over and watch other trials or other proceedings. So that her testimony on those points is probably more precise. She had more reason to remember and should be believed.

The Court: I want to make sure there was (1372a) no communcation between husband and wife regardless.

Mr. Horowitz: Yes.

The Court: Whether it came from conversations in the corridor or any place else. I want the jury to decide a case on the basis of the evidence produced here in open court and not on anything else. I think Mrs. Crismale was forthright when she said she did not discuss the case with her husband. Certainly there has been no indication here that anything was related to her by her husband. And certainly she did not discuss anything, because she didn't hear anything, and I wanted to find that out—if she had heard something, did she discuss it with other members of the jury? She said she heard nothing. So obviously there could be no discussion.

Mr. Klaessig, I am satisfied that there is no basis to extend this investigation. I am satisfied from my examination of the juror, Mrs. Crismale, and my examination of her husband, that nothing transpired that would justify a further investigation in this case. And your application to further extend it, to examine other people, will be denied. And you may submit an appropriate order.

And I think that closes the three prongs of the motion you originally made. One was for an acquittal, (1373a) one was for a new trial in lieu of that,

and the third was the investigation of Juror No. 7. I think those were the three prongs. You will submit an order taking care of the open prong. I think you have already submitted an order on the other two.

Mr. Klaessig: Right.

The Court: All right.

Mr. Klaessig: Thank you, your Honor.

Mr. Horowitz: Just one more thing that I think we can resolve at this time, while everybody is here.

The Court: I have got to sentence this gentleman, because I was the trial Judge.

Mr. Horowitz: Yes, sir. Might we at this time set a sentence date?

The Court: Of course, Mr. Klaessig can't do anything until after sentencing, obviously. I think what we ought to do is this. Complete this motion by filing the necessary order which denies the further investigation of Juror No. 7. After that, if you two gentlemen will get together, give me some open dates when you gentlemen are free, when the defendant is available. Then I will try to accommodate you rather than fix a date now. It is a little difficult for me to fix a date now. And, of course, a thing like this (1374a) should not be delayed, either.

Mr. Horowitz: Right.

The Court: Get that order in first.

You gentlemen agree. Mr. Hecht has got to be present. Give me a few dates and I will pick one.

Mr. Klaessig: Thank you, your Honor.

The Court: All right. In the meantime they continue on bail, both defendants. I am only interested in one right now, Mr. Hecht.

Mr. Horowitz: Yes, sir.

The Court: All right.

Order Denying Further Leave to Investigate Juror No. 7

(Filed—December 12, 1967)

This matter being opened to the Court by the defendant through his attorney, Frederick Klaessig, Esquire, in the presence of David M. Satz, Jr., United States Attorney for the District of New Jersey, Donald Horowitz, Assistant United States Attorney, appearing, on defendant's motion for leave pursuant to Rule 19(g) of the General Rules of the United States District Court for the District of New Jersey to investigate an unidentified person (presumably the husband of Juror No. 7) and Juror No. 7, Mrs. Estelle Crismale; and

The Court having taken testimony under oath in open court of Juror No. 7 and her husband, Mr. Vito Crismale; and having considered this testimony and the arguments of counsel, and having found that good cause has not been shown;

It is hereby ORDERED on this 12th day of December, 1967 that the motion be and hereby is denied.

ANTHONY T. AUGELLI
Judge, United States District Court

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Burton v. *Driggs*, 20 Wall. 125	9
Gordon v. *United States*, 344 U.S. 414	9
McClanahan v. *United States*, 292 F. 2d 630, certiorari denied, 368 U.S. 913	9
McDonold v. *United States*, 200 F. 2d 502	8
United States v. *Cotter*, 60 F. 2d 689, certiorari denied, 287 U.S. 666	8
United States v. *Mortimer*, 118 F. 2d 266, certiorari denied, 314 U.S. 616	8

Statutes and rule involved:

18 U.S.C. 371	2
18 U.S.C. 656	2
Rule 19G, General Rules of the United States District Court for the District of New Jersey	10

330-473—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 840

MILTON HECHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5a–6a) was entered on November 19, 1968. On December 16, 1968, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge properly admitted into evidence oral evidence concerning the audit of petitioner's bank accounts.

2. Whether the trial judge, after a hearing, properly denied a motion for a new trial based on allegations that a juror's husband had attended the trial and talked to jurors, witnesses, and the prosecutor.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to misapply the funds of a national bank (18 U.S.C. 371, 656). On January 29, 1968, petitioner was sentenced to imprisonment for three years and fined $5,000.

1. Between 1960 and 1965 the Citizens National Bank of Englewood, New Jersey, suffered a loss in excess of $300,000 due to the misapplication of bank funds by one of its officers, co-indictee Francis J. Paxton (R. 532, 588, 1230). Paxton was in charge of the bookkeeping operations of the multi-branch bank (R. 253). Petitioner maintained at the bank a personal checking account and corporate accounts for two family-owned businesses, Colortone Photo Service and Starbrite Photo Corporation (R. 41–42).

(a) Paxton testified as a prosecution witness that he had agreed with petitioner to "hold back" any checks drawn by petitioner against insufficient funds, and not to post them or debit petitioner's accounts. Paxton would telephone petitioner when the bank received checks drawn on insufficient funds and advise him of the need to cover the checks. Petitioner would either advise return of the check to the payee (R. 283–284, 415, 962, 972) or promise to make the necessary deposits. When petitioner failed to deposit

the required sum (R. 98, 110). Paxton, initially as an accommodation, but later for a fee of $50 per month (R. 103, 243), would not return the checks to the clearing house. Whenever checks are not returned, the clearing house debits the drawer's bank (Citizens) and credits the payee's bank (R. 87–102, 109–110, 456–457).

Paxton would then place petitioner's unreturned N.S.F. checks in a file cabinet in the vicinity of his office (R. 95), without debiting any of the petitioner's three accounts (R. 102, 396–398). In the early years of the scheme, Paxton was able to conceal the non-debiting—and thus the financial loss suffered by the bank when the clearing house credited the payees of petitioner's checks—by "adjusting" the bank balances of innocent and inactive accounts (R. 233). Upon petitioner's request (R. 118) Paxton was also able to create false deposits to petitioner's accounts (R. 119, 254, 853). When in 1964 the bank adopted a computer system of bookkeeping, Paxton's system changed. On November 23, 1964, for example, three Starbrite checks totalling $7,790 and payable to a Lou Jacobs were paid by the bank but the computer was programed so that it could not debit the Starbrite account (R. 44, 63, 138, 143). Paxton also covered some of petitioner's checks during this period by punching out on the computer fictitious deposits to petitioner's Starbrite account. He created three such deposits during the period June 15–July 13, 1965, in the amounts of $20,000, $7,301.16, and $1,650 (R. 155–168, 473).

On October 11, 1965, after a different accounting firm appointed by the bank conducted a surprise

audit (R. 501, 523), Paxton confessed his guilt.[1] He directed bank officials and federal investigators to his desk drawer and file cabinet where they found the three November 1964 Lou Jacobs checks drawn on petitioner's Starbrite account (Exhs. G. 1–3), and to 110 other insufficient-fund checks dating back to 1960 drawn on petitioner's personal, Colortone, and Starbrite accounts (R. 39). These checks were conceded to be authentic (R. 622, 1012, 1021, 1024). If these checks had been routinely cleared they should have been stamped "paid" and returned to the drawer (petitioner) with his monthly statements (R. 347, 392). Paxton retained these non-debited checks along with a quantity of "paid" checks and two properly paid, but not stamped, Starbrite checks (R. 61, 134, 389, 441, 1173).[2] Paxton told the investigators he retained all checks and other documents to prove what had happened to the money and to have something to hold over petitioner and his companies (R. 251–252, 389–390).

(b) Various bank records were authenticated and introduced (R. 80). Exhibit G. 135, a computer printout kept and maintained in the ordinary course of business and found in proper sequence in the records of the bank (R. 44, 50), showed that the Starbrite

[1] Paxton was charged with conspiring with petitioner, with the substantive offense of misapplying the bank's funds to petitioner's credit, and with manipulating his own account. He pleaded guilty to the three counts (R. 87, 263). He also, without compensation, had withheld checks chargeable against other accounts (R. 175, 229, 258).

[2] The failure to stamp these two checks could have been caused by clerical or mechanical error in processing (R. 293).

account had been "closed" to the computer's posting of the three November 1964 checks payable to Lou Jacobs (R. 44, 63). Exhibits G. 132 and 133 (R. 43, 50) were Recordak copies of Starbrite statements purporting to show the three deposits during June–July 1965 (R. 471–473).

Negative evidence indicating an absence of certain bank records was also permitted. Mr. Metzheiser, the auditor of the bank, testified that, under his supervision and direction, clerical assistants checked the microfilm records of petitioner's monthly statements and records of checks actually charged against petitioner's accounts (R. 469, 559, 562–563). They would first search for a debit in the statement equal in amount to a check cleared by the clearing house, examining the statement or statements covering the three or four week period after the date of the check. If a debit was found, Mr. Metzheiser personally compared the debit to the check to determine whether it did relate to one of the checks found in Paxton's drawer (R. 469). Mr. Metzheiser was present 99% of the time that the records were being checked and personally did some of the actual checking (R. 468–469). None of the three Lou Jacobs checks (Exhs. G. 1–3) were found to have been charged against petitioner's accounts (see R. 469).[3] As for deposits, a search was made for supporting deposit tickets corroborative of the deposit credits shown on the Starbrite bank statements (R. 470–473). If none was

[3] Using these methods, however, Mr. Metzheiser determined that two of the checks in Paxton's desk drawer or file cabinet, although not stamped "paid", *had* actually been paid by the bank and charged against petitioner's account (R. 1173).

found, another searcher would be used to double-check (R. 513). No deposit tickets could be found for twelve deposits, including three deposits designated as overt acts (R. 470–473).

The bank's microfilm copies of the underlying statements were not introduced. Bank records were, however, available to the defense (R. 62), and the defense made extensive use of such records in its cross-examination (*e.g.*, R. 57, 202, 211–239, 274, 511, 526, 554–557, 576–577).

2. After conviction, petitioner and his brother, Marvin, submitted affidavits in support of a motion for a new trial, alleging that they had seen a man in the courtroom throughout the trial and had seen him talking with government witnesses and the assistant United States attorney. After verdict they saw him meet juror No. 7 (R. 1342–1347).

A hearing was held on November 13, 1967, on short notice so that the witnesses would come in fresh (R. 1348, 1368). Juror No. 7 and her husband were called as court witnesses. The juror testified that her husband had had a heart attack and that she had not wanted him to remain at home alone; instead, he drove her to the courthouse and back each day (R. 1350–1351). She testified that she had told her husband on the first day that they were not allowed to discuss the case and that she had not in fact discussed it with him (R. 1350, 1357). Her husband, she said, did not tell her what had gone on while the jury was not in the courtroom (R. 1352–1353). She acknowledeged that he had told her that some man in the corridor had asked him what his wife thought about the case but that he had said he did

not discuss the case with his wife (R. 1352). On one or two days she and her husband had had lunch with other women jurors, but they had not discussed the case (R. 1354–1356).

The husband, who had been excluded from the courtroom during the questioning of his wife, testified that he had not remained every day in the particular courtroom where his wife was a juror (R. 1358) and did not pay much attention to the legal arguments held out of the jury's presence (R. 1358–1359). He insisted that he did not tell his wife what he heard in the courtroom (R. 1359). He denied talking to people in the corridor except for replying "I don't know what my wife is doing" when approached by a man who had asked him what his wife thought about the case (R. 1359–1361). He could not remember having lunch with anyone but his wife (R. 1362).[4]

The trial court found that the juror and her husband had not discussed the case and therefore concluded that there was no reason to extend the investigation to subpoena various persons, such as government witnesses, to whom the husband was alleged to have talked (R. 1366, 1372, 1375).

ARGUMENT

1. (a) Petitioner's contention that Mr. Metzheiser's testimony concerning the work of his clerical assistants in the performance of the audit deprived him of

[4] The Assistant United States Attorney conceded that he had had one brief conversation with the husband, but only after the jury had begun deliberating (R. 1367, 1369).

his Sixth Amendment right of confrontation (Pet. 20–27) is unsound. Petitioner's accounts were extremely active (R. 984, 992, see R. 1241). To prove the negative facts of non-debiting of checks and non-depositing of funds all records pertaining to his accounts for a period in excess of five years had to be searched. The entries also had to be checked, compared, and verified. Obviously this would have been impossible for one person to do in any reasonable period of time and counsel at trial so argued (R. 1241). There was no constitutional deprivation in not calling all of the clerical personnel who did much of the underlying surveys.

When the multitude of records cannot be checked by one person alone a searcher may use assistants, and the probable correctness of the underlying bank records makes slight the danger of mistake in not calling the assistants as witnesses. Such accuracy and reliability "far outweighs any protection to the other side, afforded by emptying the bank of much of its clerical force." *United States* v. *Cotter,* 60 F. 2d 689, 693 (C.A. 2), certiorari denied, 287 U.S. 666.[5]

The authenticity of the entire audit depended upon Mr. Metzheiser's supervision and direction. "His should therefore be the testimony upon which its evidential value rests." *United States* v. *Mortimer,* 118 F. 2d 266, 269–270 (C.A. 2), certiorari denied, 314 U.S. 616; *McDonold* v. *United States,* 200 F. 2d 502, 503–504 (C.A. 5). The circumstance that the wit-

[5] Significantly, the audit revealed the fact that two checks found in Mr. Paxton's drawer had been paid, even though not so stamped.

ness had not personally examined all of the records bore on the weight to be accorded his testimony, not on its constitutional admissibility.

Furthermore, the evidence of the audit conducted under Mr. Metzheiser's supervision was largely collateral and cumulative, since the conspiracy conviction was not dependent on the showing of any shortage in the funds of the bank; various bank records, such as those found in Paxton's files and the files of the bank, were introduced in evidence and amply corroborated Paxton's testimony concerning the conspiracy. Thus, the trial court's rulings limiting the documentary evidence required to be produced lay within its sound discretion and did not prejudice petitioner's constitutional rights.

(b) Petitioner's related argument (Pet. 27–31) that Mr. Metzheiser's testimony concerning the search of the bank records violated the best evidence rule is similarly ill-founded. The fact to be proved in each instance was the absence of an entry, a matter entirely separate from the contents of actual entries. Oral evidence may be received concerning the absence of a record, and the record searched need not be produced if the search resulted in a finding that no entry existed. *Burton* v. *Driggs,* 20 Wall. 125, 136; *McClanahan* v. *United States,* 292 F. 2d 630, 636 (C.A. 5), certiorari denied, 368 U.S. 913. Petitioner's reliance (Pet. 28) on *Gordon* v. *United States,* 344 U.S. 414, is misplaced; that case involved merely a demand for production of a prosecution witness's prior statements tending to exculpate the defendant, and the Court held only that his oral acknowledgment of the in-

consistency did not necessarily preclude defense efforts to put the full written statement before the jury. In the present case the government did not endeavor to prevent petitioner from obtaining or using the bank records, either for cross-examination or as part of the defense's case.

2. The trial judge acted well within his discretion in denying the motion for a new trial. The significant fact was not whether the juror's husband had talked to anyone in the corridor but whether he had told his wife anything she should not have heard.[6] The judge passing on the motion was entitled to rely on his own observations of the juror and her husband under examination in crediting their testimony that they had never discussed the case. The judge could properly credit the husband's testimony that he was not really interested in the case and was merely sitting in on that case (and others) during his convalescence, and could find his lack of precise recollection consistent with that attitude.

[6] Rule 16G of the General Rules of the United States District Court for the District of New Jersey (Pet. 32), on which petitioner premised his motion, relates only to the questioning of a juror or relative during the trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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